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Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In the
Supreme Court of the United States

EXTREME NETWORKS, INC.,
Petitioner,

v.

ENTERASYS NETWORKS, INC.
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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March 2011

QUESTIONS PRESENTED

1. Whether an unqualified money judgment for a sum certain is final for purposes of appellate jurisdiction under 28 U.S.C. §§ 1291 and 1295.

2. Whether, when a postjudgment motion tolls the time to file a notice of appeal under Federal Rule of Appellate Procedure 4(a)(4)(A), the time to appeal runs from the date of an order granting the motion or from the date of a judgment's alteration or amendment upon such motion.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner Extreme Networks, Inc., states that it has no parent corporation and that no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Extreme Networks, Inc., respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The Federal Circuit's decision below, *Extreme Networks, Inc. v. Enterasys Networks, Inc.*, 395 F. App'x 709 (Fed. Cir. 2010), is reprinted at Pet. App. 1a–15a. The Federal Circuit's orders denying rehearing are reprinted at Pet. App. 55a–58a.

The district court's October 28, 2008 Opinion and Order disposing of the parties' post-trial motions (available in Lexis at 2008 U.S. Dist. LEXIS 88540 (W.D. Wis. Oct. 28, 2008)) is reprinted at Pet. App. 16a–32a. The district court's November 5, 2008 Judgment is reprinted at Pet. App. 33a–35a. The district court's March 16, 2009 order disposing of postjudgment motions (available in Lexis at 2009 U.S. Dist. LEXIS 22735 (W.D. Wis. March 16, 2009)) is reprinted at Pet. App. 36a–50a. The district court's March 19, 2009 Amended Judgment is reprinted at Pet. App. 51a–54a.

JURISDICTIONAL STATEMENT

The Federal Circuit issued its opinion in this case on September 30, 2010. The Federal Circuit denied petitioner's timely-filed petition for rehearing and rehearing en banc on December 20, 2010, Pet. App. 55a, and similarly denied respondent's timely-

filed petition for rehearing on December 29, 2010. Pet. App. 57a. Chief Justice Roberts extended the time to file a petition for a writ of certiorari until April 28, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

28 U.S.C. § 1291, "Final decisions of district court," provides:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

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28 U.S.C. § 1295, "Jurisdiction of the United States Court of Appeals for the Federal Circuit," provides in pertinent part:

> (a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

(1) of an appeal from a final decision of a district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, if the jurisdiction of that court was based, in whole or in part, on section 1338 of this title, except that a case involving a claim arising under any Act of Congress relating to copyrights, exclusive rights in mask works, or trademarks and no other claims under section 1338(a) shall be governed by sections 1291, 1292, and 1294 of this title . . . .

Federal Rule of Civil Procedure 58 provides, in pertinent part:

FRCP 58. ENTERING JUDGMENT

(a) Separate Document.

Every judgment and amended judgment must be set out in a separate document, but a separate document is not required for an order disposing of a motion:

(1) for judgment under Rule 50(b);

(2) to amend or make additional findings of fact under Rule 52(b);

(3) for attorney's fees under Rule 54;

(4) for a new trial, or to alter or amend the judgment, under Rule 59; or

(5) for relief under Rule 60.

(b) Entering Judgment.

(1) Without the Court's Direction.

Subject to Rule 54(b) and unless the court orders otherwise, the clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment when:

(A) the jury returns a general verdict;

(B) the court awards only costs or a sum certain; or

(C) the court denies all relief.

(2) Court's Approval Required.

Subject to Rule 54(b), the court must promptly approve the form of the judgment, which the clerk must promptly enter, when:

(A) the jury returns a special verdict or a general verdict with answers to written questions; or

(B) the court grants other relief not described in this subdivision (b).

Federal Rule of Civil Procedure 59 provides, in pertinent part:

FRCP 59. NEW TRIAL; ALTERING OR AMENDING A JUDGMENT

. . .

(e) Motion to Alter or Amend a Judgment.

A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.

Federal Rule of Civil Procedure 60 provides, in pertinent part:

FRCP 60. RELIEF FROM A JUDGMENT OR ORDER

. . .

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding.

On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been

discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

Federal Rule of Appellate Procedure 4 provides, in pertinent part:

FRAP 4. APPEAL AS OF RIGHT – WHEN TAKEN

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered . . .

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered.

(B) . . .

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment's alteration or amendment upon such a motion, must file a notice of

> appeal, or an amended notice of appeal . . . within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

STATEMENT OF THE CASE

1. Petitioner brought this action for patent infringement against the respondent in the United States District Court for the Western District of Wisconsin. Respondent counterclaimed with its own patent infringement claims against petitioner.

Prior to trial, the district court entered summary judgment against respondent or otherwise dismissed respondent's patent infringement counterclaims. At trial in May 2008, the jury found that respondent infringed petitioner's three patents and awarded $201,213 in damages to petitioner.

On October 28, 2008, the district court issued an "Opinion and Order" resolving post-trial motions and directing the clerk to enter judgment in favor of petitioner. Pet. App. 16a. The order further provided that "[t]his Court retains jurisdiction to enforce any and all aspects of this order and to award plaintiff supplemental damages, interest or costs."[1] Pet. App. 32a.

On November 5, 2008, the district court entered "Judgment in a Civil Case" in a separate document, in compliance with Federal Rule of Civil Procedure 58(a). Pet. App. 33a–35a (hereinafter, "November

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[1] In referring to "supplemental damages," the district court meant petitioner's damages for the period after January 8, 2008. The jury awarded damages in the form of a reasonable royalty from the period of the commencement of the suit in April 2007 until January 8, 2008, the period for which sales information had been produced.

Judgment"). The November Judgment dismissed respondent's patent infringement counterclaims with prejudice, awarded petitioner the unqualified sum certain of $201,213, and permanently enjoined respondent from infringing petitioner's patents. Pet. App. 33a–35a.

Both petitioner and respondent filed motions to modify the injunction within 10 days of the entry of the November Judgment. Petitioner characterized its motion as a Federal Rule of Civil Procedure 59(e) motion to amend or alter the judgment; respondent characterized its motion as a Federal Rule of Civil Procedure 60(b) motion for relief from judgment. Respondent also filed a Civil Rule 59(a) motion for a new trial. For present purposes, the significance of these motions is that they tolled the time to file a notice of appeal from the November Judgment. *See* Fed. R. App. P. 4(a)(4)(A)(iv), (v), and (vi).

On December 30, 2008, petitioner filed a motion for supplemental damages (to account for damages incurred after January 8, 2008) and for prejudgment interest. Petitioner did not invoke any rule in filing this motion. Because it was filed outside of the then-applicable 10-day time limit of Federal Rule of Appellate Procedure 4(a)(4)(A),[2] this motion—unlike the parties' motions discussed in the preceding paragraph—did not toll the time to file a notice of appeal from the November Judgment.

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[2] On December 1, 2009, amendments to Appellate Rule 4 took effect that increased the 10-day time limit to 28 days. Those amendments are not relevant to this case.

On March 16, 2009, the district court entered an order disposing of all pending postjudgment motions. Pet. App. 36a–50a. This order granted in part respondent's Civil Rule 60(b) motion to modify the injunction, denied petitioner's Civil Rule 59(e) motion to modify the injunction, denied respondent's Civil Rule 59(a) motion for a new trial, and granted in part petitioner's non-tolling motion for supplemental damages and prejudgment interest.

The district court entered an "Amended Judgment in a Civil Case" on March 19, 2009. Pet. App. 51a–54a. The Amended Judgment differed from the November Judgment in two respects: First, the Amended Judgment modified the terms of the injunction; and second, the Amended Judgment additionally provided for $48,304 in supplemental damages and $15,297 in prejudgment interest. Pet. App. 52a–54a.

Respondent filed a notice of appeal from the Judgment and Amended Judgment on April 17, 2009, 32 days after the district court disposed of the parties' tolling motions.

2. On appeal in the Federal Circuit, respondent sought reversal of the district court's summary judgment against respondent's patent infringement counterclaims reflected in the district court's November Judgment. Respondent did not seek Federal Circuit review or reversal of any aspects of the amended portion of the Amended Judgment, *i.e.*, the terms of the modified injunction, the supplemental damages, and prejudgment interest.

Petitioner challenged the Federal Circuit's appellate jurisdiction on the basis that respondent's notice of appeal was untimely, as it was filed more than 30 days after the district court's disposition of the parties' postjudgment motions that tolled the time to appeal. In response, respondent argued that the district court's November Judgment was not final because it did not account for prejudgment interest or supplemental damages, and that the only final judgment was the Amended Judgment. Respondent argued in the alternative that to the extent that the November Judgment was final, the language "disposing of " as used in Appellate Rule 4(a)(4)(A) should be interpreted as "denying," not "denying or granting," and that the 30-day time period to file a notice of appeal ran from the entry of the Amended Judgment—not the order granting respondent's Civil Rule 60(b) motion to modify the injunction.

After full merits briefing and argument, the Federal Circuit issued a "nonprecedential" decision. As to appellate jurisdiction, the Federal Circuit held that the November Judgment was not final for purposes of 28 U.S.C. § 1295(a)(1)[3] because it did not include prejudgment interest, Pet. App. 7a, and that the case became final only when the district court

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[3] Section 1295(a)(1) confers exclusive appellate jurisdiction upon the Federal Circuit from "final decision[s]" of district courts in patent and certain other categories of cases. Section 1295(a)(1) is the analogue to 28 U.S.C. § 1291, which confers appellate jurisdiction upon the regional courts of appeals from "final decisions" of district courts in cases outside of the jurisdiction of the Federal Circuit.

entered its Amended Judgment, which awarded prejudgment interest. *Id.* at 8a. Because the respondent filed its notice of appeal within 30 days of the entry of the Amended Judgment, the court of appeals concluded, the appeal was timely. *Id.* Reaching the merits, the Federal Circuit vacated the district court's summary judgment as to one of respondent's patent infringement counterclaims and remanded for trial. Pet. App. 11a–12a.

The Federal Circuit thereafter denied petitions for rehearing filed by both parties, as well as respondent's motion, agreed to by petitioner, to stay the mandate pending any petitions for certiorari.

REASONS FOR GRANTING THE PETITION

One of the federal judiciary's most important tasks is the proper determination of its own jurisdiction. *See, e.g.*, *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."). For that reason, both the judiciary system and the litigants who participate in it benefit from clear, administrable rules governing the jurisdictional limits of the federal courts.

Petitioner asked the Federal Circuit to resolve a simple question that has nevertheless divided the circuits: whether, when a postjudgment motion tolls the time to file a notice of appeal under Appellate Rule 4(a)(4)(A), the time to appeal runs from the date of an order granting the motion or from the date

of a judgment's alteration or amendment upon such motion. Rather than confront the issue directly, the Federal Circuit avoided the question by holding that the November Judgment against respondent was not final and hence not appealable in the first instance, because it did not include any award of prejudgment interest.

The Federal Circuit's finality holding reflects a widespread confusion shared across the courts of appeals. As a general rule, a "final judgment" is one "which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment," save for ministerial tasks that "will not alter the order or moot or reverse decisions embodied in that order." *See Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 199 (1988). Here, the November Judgment finally resolved all claims between the parties and granted unqualified compensatory relief in the form of a sum certain—all that was needed for the judgment to be final and appealable. There is therefore no material difference between this case and *Osterneck v. Ernst & Whinney*, 489 U.S. 169 (1989), in which this Court treated an unqualified money judgment for a sum certain as a final and appealable judgment, subject to amendment under Civil Rule 59(e).

The courts of appeals, however, have relied upon *Osterneck* to reach antithetical conclusions. Some cite *Osterneck* for the proposition that a money judgment silent on prejudgment interest is not final. Others cite *Osterneck* to hold that a money judgment lacking prejudgment interest is nevertheless final and appealable, and can be

corrected only by the timely filing of a Civil Rule 59(e) motion to amend the judgment. In its effort to avoid the real jurisdictional question presented by respondent's untimely appeal, the Federal Circuit plunged headlong into this same morass.

Had the Federal Circuit recognized the finality of the district court's November Judgment and proceeded to consider the meaning of Appellate Rule 4(a)(4)(A), as petitioner urged it to do, its duty should have been clear. The rule's plain text states that, upon the filing of certain postjudgment motions, "the time to file an appeal runs for all parties from the entry of the order *disposing* of the last such remaining motion." Fed. R. App. P. 4(a)(4)(A) (emphasis added). At least two circuits understand this to mean that regardless of whether a judgment is amended or altered upon such an order, the time to appeal runs from entry of the order disposing of the motion. But at least two other circuits have tortured Appellate Rule 4(a)(4)(A)'s text in order to conclude that appellate timeliness should be measured from the date of a subsequent amended judgment in cases where the district court amends or alters the judgment.

The plain meaning of Appellate Rule 4(a)(4)(A) compels the conclusion that the Federal Circuit lacked jurisdiction to hear respondent's untimely appeal, much less to reverse the district court's grant of summary judgment and remand for a trial. Instead, the Federal Circuit sustained both respondent's appeal and its merits argument. This petition thus presents two important questions pertaining to federal appellate jurisdiction. To

provide predictability and uniformity where none now exists, this Court should grant review.

I. The Courts of Appeal Are in Disarray Regarding the Finality of an Unqualified Money Judgment for a Sum Certain That Does Not Include Prejudgment Interest.

The decision below highlights widespread confusion in the courts of appeals regarding whether a money judgment for a sum certain that does not award prejudgment interest is final for purposes of appellate jurisdiction. On one hand, three circuits, including the Federal Circuit below, have held that a money judgment that does not include prejudgment interest is not "final" because prejudgment interest is an "element of complete compensation" owed to a plaintiff. On the other hand, six circuits view postjudgment requests for prejudgment interest as motions to amend or alter the judgment under Civil Rule 59(e), as this Court did in *Osterneck*. These circuits assume that money judgments for a sum certain are final, and allow prejudgment interest to be added only when parties make timely Civil Rule 59(e) motions. These two positions are irreconcilable, yet both are regularly espoused by the courts of appeals, including panels within the same circuits.

The confusion stems from this Court's decision in *Osterneck*. At issue in *Osterneck* was whether a postjudgment motion for prejudgment interest constituted a motion to "alter or amend" the judgment under Civil Rule 59(e). This Court held that postjudgment motions for prejudgment interest

are made under Civil Rule 59(e) because prejudgment interest "'is an element of [plaintiff's] complete compensation.'" *Id.* at 175. As such, prejudgment interest contrasts with claims for attorney's fees, which this Court previously characterized as not implicating Civil Rule 59(e) because a claim for attorney's fees is "collateral 'to the main cause of action,' requiring an inquiry that was wholly 'separate from the decision on the merits.'" *Id.* at 174 (quoting *White v. N.H. Dep't of Emp't Sec.*, 455 U.S. 445, 451–452 (1982)). The holding and rationale of *Osterneck* have steered the lower courts in conflicting directions.

a. *Osterneck* establishes that questions of prejudgment interest are part of the plaintiff's compensation and hence involve the merits of the case. As a result, like the Federal Circuit below, the First and Seventh Circuits have concluded, based on *Osterneck* and its discussion of *Budinich*, that a money judgment that does not provide prejudgment interest necessarily lacks finality. *See, e.g.*, *Commercial Union Ins. Co. v. Seven Provinces Ins. Co.*, 217 F.3d 33, 37 (1st Cir. 2000) (holding that a money judgment lacking prejudgment interest was not final, citing *Osterneck*); *Kaszuk v. Bakery & Confectionary Union & Indus. Int'l Pension Fund*, 791 F.2d 548, 553 (7th Cir. 1986) (same).

b. On the other hand, *Osterneck*'s holding that postjudgment demands for prejudgment interest fall under Civil Rule 59(e) implicitly establishes that an antecedent merits judgment that does not address prejudgment interest *must* necessarily be final. As a logical matter, such "motions to alter or amend a

judgment" can only be filed to challenge appealable judgments. *See* Fed. R. Civ. P. 54(a) ("'Judgment' as used in these rules includes . . . any order from which an appeal lies."); *Bankers Trust Co. v. Malis*, 435 U.S. 381, 384 n.4 (1978) ("A 'judgment' for purposes of the Federal Rules of Civil Procedure would appear to be equivalent to a 'final decision' as that term is used in 28 U.S.C. § 1291."); *see also* 10 James Wm. Moore et al., *Moore's Federal Practice* § 54.02, at 54-20 (3d ed. 2011) ("Rule 59 requires that any motion for new trial or to alter or amend the judgment be served not later than 28 days 'after the entry of the judgment'; because Rule 54(a) defines the term 'judgment' as used in Rule 59, the time for filing a Rule 59 motion does not begin to run until an appealable judgment is entered.").

The First, Third, Seventh, Eighth, Ninth, and Tenth Circuits have therefore relied upon *Osterneck* to reject as untimely requests for prejudgment interest made outside of Civil Rule 59(e)'s strict time limit, on the grounds that the failure to timely file a challenge to a money judgment not containing prejudgment interest constituted a waiver of any claim to prejudgment interest. *See, e.g.*, *McCalla v. Royal Maccabees Life Ins. Co.*, 369 F.3d 1128, 1133 (9th Cir. 2004) (judgment lacking prejudgment interest "was final"; "operational consistency" required that any claim to prejudgment interest be brought within the time limit of Civil Rule 59(e)); *Schake v. Colt Indus. Operating Corp. Severance Plan*, 960 F.2d 1187, 1192 (3d Cir. 1992) ("The United States Supreme Court has held that 'a postjudgment motion for discretionary prejudgment interest involves the kind of reconsideration of

matters encompassed within the merits of a judgment.' Therefore, they must be timely filed within 10 days of entry of the *final judgment*, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure." (emphasis added; citation to *Osterneck* omitted)); *Reyher v. Champion Int'l Corp.*, 975 F.2d 483, 487–489 (8th Cir. 1992) (judgment for sum certain was silent as to prejudgment interest; plaintiff's motion for prejudgment interest was untimely Rule 59(e) motion, citing *Osterneck*); *Crowe v. Bolduc*, 365 F.3d 86, 92–93 (1st Cir. 2004) (judgment that was silent as to prejudgment interest could only be challenged by a Civil Rule 59(e) motion filed within the rule's 10 day time limit, citing *Osterneck*); *Capstick v. Allstate Ins. Co.*, 998 F.2d 810, 813 (10th Cir. 1993) (same); *McNabola v. Chicago Transit Auth.*, 10 F.3d 501, 520 (7th Cir. 1993) (same). *See also* 12 James Wm. Moore et al., *Moore's Federal Practice* § 60.11[3], at 60-41 (3d ed. 2011) ("[W]hen a judgment wholly omits prejudgment interest, the proper vehicle for augmenting the judgment to include prejudgment interest is a motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e)[.]"). If a money judgment for a sum certain that does not include prejudgment interest is not final, then Civil Rule 59(e)'s time limit would not apply, and these decisions denying prejudgment interest must be in error, because the judgments in these cases were never final to begin with.

The Seventh Circuit, in a decision written by Judge Posner, explained that the unstated assumption of *Osterneck* and the foregoing decisions is that the absence of prejudgment interest in a final

judgment does not destroy finality; it merely means that in entering judgment for a sum certain, the district court implicitly denied prejudgment interest, for which the remedy is either a timely Rule 59(e) motion or appeal:

> It is true that prejudgment interest is part of the judgment, not collateral to it, like attorney's fees [citing *Osterneck*]. But all that means, so far as bears on this case, is that if the judge had not awarded prejudgment interest, Herzog would have had to file a Rule 59(e) motion in order to get him to do so. *The omission of prejudgment interest would not have detracted from the finality of the original judgment; it just would have made it erroneous.*

Herzog Contracting Corp. v. McGowan Corp., 976 F.2d 1062, 1064 (7th Cir. 1992) (emphasis added).

c. The confusion over finality of money judgments lacking prejudgment interest is so deeply rooted that both views occasionally persist within the same opinion. For example, in *Dunn v. Truck World, Inc.*, another Seventh Circuit panel first seemed to recognize that a pending request for prejudgment interest could not disturb the finality of a money judgment, because "[f]inal judgment necessarily denies pending motions, and so starts the time for appeal." 929 F.2d 311, 313 (7th Cir. 1991) (collecting cases). But then the same panel proceeded to cite *Osterneck* for the proposition that "an outstanding request for pre-judgment interest defeats finality," notwithstanding its prior statement

regarding the effect a judgment has upon such outstanding requests. *See id.* The result is paradoxical: an outstanding request for prejudgment interest defeats the finality of a judgment, but the entry of an unqualified judgment for a sum certain denies any outstanding request for prejudgment interest.

It is therefore no surprise that both views have been inconsistently adopted and applied by the lower courts, including different panels within the same circuit. *Cf., e.g., Kaszuk*, 791 F.2d at 553, with *McNabola*, 10 F.3d at 520 (Seventh Circuit intra-circuit conflict); *Commercial Union Ins. Co.*, 217 F.3d at 37, with *Crowe*, 365 F.3d at 92–93 (First Circuit intra-circuit conflict). This case provides an ideal vehicle through which to clarify this question, by adopting a clear, bright-line rule, consistent with the reasoning of Judge Posner's opinion for the Seventh Circuit in *McGowan*, that an unqualified money judgment for a sum certain is final, and that the remedy for any erroneous omission of compensatory relief in the judgment is relief under Rule 59(e) or appeal.[4]

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[4] For the same reasons, the unqualified November Judgment for a sum certain necessarily denied petitioner's claim for supplemental damages. Thus, resolution of the first question presented will also dispose of respondent's contention, advanced in but not addressed by the Federal Circuit, that the November Judgment was not final for the additional reason that the November Judgment did not resolve the issue of supplemental damages.

II. The Courts of Appeals Are Divided Over Whether the Time to Appeal Runs From the Date of an Order Granting a Postjudgment Tolling Motion or From the Date of Any Subsequent Amended Judgment.

Beyond the issue of finality, this case raises a second issue that has divided the lower courts. Under Appellate Rule 4(a)(4)(A), certain postjudgment motions[5] toll the time to file a notice of appeal until "*the entry of the order disposing of the last such remaining motion.*" Fed. R. App. P. 4(a)(4)(A) (emphasis added). The courts of appeals disagree whether the time to appeal runs from the date of an order granting a tolling motion or from the date of any subsequent amended judgment resulting from the granting of such a motion. If, as petitioner contends, the district court's original November Judgment was "final," then whether respondent's notice of appeal was timely filed also turns on resolution of this circuit split.

a. The First and Second Circuits recognize that, under Appellate Rule 4's plain text, when a tolling motion is filed and the motion is granted, the time to

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[5] "Tolling motions" are motions for judgment as a matter of law under Civil Rule 50(b), to amend or make additional factual findings under Civil Rule 52(b), for attorney's fees under Civil Rule 54 (if, pursuant to Civil Rule 58(e), the district court orders an attorney's fees motion to have the same effect as a tolling motion), to alter or amend the judgment under Civil Rule 59(e), for a new trial under Civil Rule 59(a), or for relief under Civil Rule 60 (if filed not later than 28 days after judgment is entered). *See* Fed. R. App. P. 4(a)(4)(A)(i)–(vi).

appeal runs from the date of the order resolving the tolling motion, not the date of the entry of any amended or altered judgment.

In *Bennett v. City of Holyoke*, 362 F.3d 1 (1st Cir. 2004), the First Circuit held that the date of the resolution of a tolling motion controls the time to appeal a tolled judgment. In that case, a district court judgment was tolled by the timely filing of a motion for attorney's fees. *Id.* at 4. The First Circuit recognized that the time to appeal the tolled judgment therefore ran from the date the district court entered its order awarding attorney's fees to the plaintiff—not the date of the amended judgment, entered twelve days later. *Id.* at 4. As a result, the court of appeals determined that the appellant had noticed its appeal *after* the deadline set by Appellate Rule 4, because the notice of appeal was not filed within 30 days of the order disposing of the last outstanding tolling motion. *Id.*

Bennett is consistent with the Second Circuit's decision in *Cardillo v. United States*, 767 F.2d 33 (2d Cir. 1985). In *Cardillo*, the federal government failed to appeal a judgment within 60 days of the date of the order resolving the government's Civil Rule 59(e) motion to amend the judgment or for new trial,[6] as it believed that its time to appeal instead ran from the entry of an amended judgment a few days later. *Id.* at 34. The Second Circuit recognized

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[6] In cases where the federal government is a party, Appellate Rule 4 extends the window to appeal a civil judgment to 60 days rather than 30. *See* Fed. R. App. P. 4(a)(1)(B).

that, under the plain language of Appellate Rule 4, the government's appeal was time-barred: "Rule 4(a)(4) of the Federal Rules of Appellate Procedure provides in pertinent part that, if a timely [tolling] motion is made . . . , the time to appeal shall run from the entry of the order granting or denying the motion. The consensus seems to be that this rule is mandatory and jurisdictional and should be applied literally." *Id.*[7]

b. The Sixth and Seventh Circuits take a contrary view, holding that when a judgment is amended or altered by a tolling motion, the time to appeal runs from the date of the entry of the amended or altered judgment, rather than the entry of the order granting the motion.

In *Employers Insurance of Wausau v. Titan International*, 400 F.3d 486 (7th Cir. 2005), the district court granted a Civil Rule 59(e) motion to amend the judgment, and later entered an amended judgment. The defendant appealed within 30 days of the amended judgment, but not within 30 days of the prior order resolving the tolling postjudgment motions. *Id.* The *Titan* court began by respecting

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[7] *Cardillo* was decided under a prior version of Appellate Rule 4(a)(4)(A), which explicitly stated that the time to appeal ran from "the entry of the order denying a new trial or granting or denying any other [tolling] motion." *See* Fed. R. App. P. 4(a)(4)(A) (1983). The rule was amended in 1993 to use the word "disposing" as a synonym for "granting or denying," and there is no indication that the 1993 amendments were intended to effect a substantive change that would have overruled *Cardillo*.

the plain text of the rule, recognizing both that Appellate Rule 4(a)(4)(A) fixes a party's time to appeal from the date of an order "disposing" of a tolling motion and that "[g]ranting a motion is one way of 'disposing' of it." *Id.* at 488–489. But rather than follow the text to its logical conclusion, the Seventh Circuit perceived a tension between this reading and Civil Rule 58, which states that judgments and amended judgments must be set forth in separate documents, but that no separate document is required for orders "disposing" of the tolling Appellate Rule 4 motions. *See id.* (citing Fed. R. Civ. P. 58(a)). According to the *Titan* court, this created a "logically impossible" result—the court did not believe that Civil Rule 58 would require that amended judgments be subject to the separate-document rule only to then exempt the most likely causes of amended judgments from the rule. *See id.* Instead, the *Titan* court concluded that the word "disposing," as used in Appellate Rule 4(a)(4) and Civil Rule 58(a), should be interpreted to mean only "denying."[8]

Titan is consistent with the rule followed in the Sixth Circuit. *See Stern v. Shouldice*, 706 F.2d 742, 747 (6th Cir. 1983) (holding that the 30-day period to file a notice of appeal runs from the date of the entry of an amended judgment, rather than the order

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[8] Although a later Seventh Circuit panel expressed concerns about the "tension [the *Titan* holding] creates with the language of the rule," the court of appeals followed *Titan* as a matter of stare decisis. *See Kunz v. DeFelice*, 538 F.3d 667, 674 (7th Cir. 2008).

granting a Rule 59(e) motion to amend the judgment).

* * *

The circuit conflict is clear. Under the interpretation of Appellate Rule 4(a)(4)(A) followed in the First and Second Circuits, respondent's notice of appeal was untimely if the November Judgment was final. Under the contrary interpretation advanced by the Sixth and Seventh Circuits, respondent's appeal was valid. This case therefore squarely provides a vehicle to resolve the conflict.[9]

III. The Questions Presented Involve Recurring and Important Issues of Federal Practice That This Court Should Resolve.

The questions presented are important and recurring questions of federal practice that implicate day-to-day litigation in the district courts and the courts of appeals. As such, both the federal judicial system and those who rely upon it would benefit from this Court's review.

This Court has repeatedly expressed the view that "'[t]he considerations that determine finality are not abstractions but have reference to very real

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[9] Although the Federal Circuit did not pass upon this issue, petitioner pressed it in the Federal Circuit, thus preserving it for this Court's review. *See United States v. Williams*, 504 U.S. 36, 41 (1992) (holding the traditional "pressed or passed upon" rule for granting certiorari requires that the claim be either "pressed" or "passed," not both).

interests—not merely those of the immediate parties, but, more particularly, those that pertain to the smooth functioning of our judicial system.'" *Budinich*, 486 U.S. at 201 (citing *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 69 (1948)). Such smooth functioning requires that "[t]he time of appealability, having jurisdictional consequences, should above all be clear." *Id.* As "[u]ncertainty regarding the question of jurisdiction is particularly undesirable, and collateral litigation on the point particularly wasteful," *Grupo Dataflux v. Atlas Global Group, LP*, 541 U.S. 567, 582 (2004), the questions presented merit this Court's review.

IV. The Federal Circuit Lacked Jurisdiction Over Respondent's Untimely Appeal.

As the November Judgment was a final, appealable judgment, the Federal Circuit should have dismissed respondent's appeal as untimely. Instead, the Federal Circuit exercised jurisdiction that it did not possess, using it to reverse a summary judgment decision that it never should have reviewed. This Court should grant certiorari to address these questions of finality that have confused the lower courts, adopt a bright-line rule establishing the finality of the November Judgment, and rule that the Federal Circuit lacked jurisdiction over respondent's untimely appeal.

a. Contrary to the Federal Circuit's holding, the district court's November Judgment was a "final decision" for purposes of 28 U.S.C. § 1295 because it contained the two essential elements of a final judgment.

First, the November Judgment adjudicated "all the *claims*" of the parties within the meaning of Civil Rule 54(b) by entering judgment in favor of petitioner's patent infringement claims and dismissing with prejudice respondent's patent infringement counterclaims. *See* Fed. R. Civ. P. 54(b) (district court's orders are interlocutory until the entry of an order adjudicating "all the claims" of the parties).

Second, the November judgment granted unqualified *relief* with respect to petitioner's claims, and thereby satisfied the requirement of Rule 54(b) that a final judgment must determine "all the parties' rights and liabilities." Fed. R. Civ. P. 54(b). In accordance with Civil Rule 58, the November Judgment awarded unqualified compensatory relief for petitioner's patent infringement claims in the form of a money judgment for a "sum certain." Fed. R. Civ. P. 58(b)(1)(B). On its face, the November Judgment thus "end[ed] the litigation on the merits and [left] nothing for the court to do except execute the judgment." *See Budinich*, 486 U.S. at 199.

To the extent that the November Judgment did not award the prejudgment interest or supplemental damages sought by petitioner, it was no different from any other judgment that fails to provide the full relief sought by a plaintiff. The remedy to correct an unsatisfactory judgment is to timely move for postjudgment relief or to appeal—not to pretend that the judgment is not final. *See McGowan*, 976 F.2d at 1064 ("The omission of prejudgment interest would not have detracted from the finality of the original judgment; it just would have made it erroneous.").

Thus, there is no material difference between the instant case and *Osterneck*. Both cases involved requests for prejudgment interest that were raised before a district court entered judgment but were not granted until after the judgment was entered. *Osterneck* treated the original unqualified money judgment for a sum certain as final and categorized the postjudgment efforts to resolve the interest issue under Civil Rule 59(e)—a rule that, by design, applies only to efforts to alter or amend a final judgment. *See* Fed. R. Civ. P. 54(a) ("'Judgment' as used in these rules includes . . . any order from which an appeal lies."); *Bankers Trust,* 435 U.S. at 384 n.4 ("A 'judgment' for purposes of the Federal Rules of Civil Procedure would appear to be equivalent to a 'final decision' as that term is used in 28 U.S.C. § 1291."). Consistent treatment here compels the conclusion that the unqualified November Judgment for a sum certain was final, notwithstanding the absence of prejudgment interest, because the November Judgment necessarily denied prejudgment interest.[10]

b. Respondent also argued below that even if the November Judgment was final, under Appellate Rule 4(a)(4)(A) the filing of tolling motions tolled its time to file a notice of appeal, and that its time to file a notice of appeal did not begin to run until the entry of the Amended Judgment, which modified the injunction contained in the November Judgment. Respondent is wrong.

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[10] For the same reasons, the unqualified November Judgment for a sum certain also necessarily denied petitioner's claim for supplemental damages.

Appellate Rule 4 dictates that when a postjudgment tolling motion is filed, the time to file a notice of appeal begins to run from "the entry of the order *disposing* of the last such remaining [tolling] motion," Fed. R. App. 4(a)(4)(A) (emphasis added)—not from the date of any subsequent amended judgment. To "dispose" means "[t]o settle or decide a matter." *The American Heritage Dictionary of the English Language* 380 (1981). An order *granting* a motion to alter or amend a judgment plainly settles or decides the motion, as even the Seventh Circuit recognizes. *See Titan*, 400 F.3d at 488–489 (under plain text of Appellate Rule 4, order granting tolling motion would count as order "disposing" of motion).

This Court has admonished the courts of appeals to apply Appellate Rule 4's "plain wording," *Acosta v. La. Dep't of Health & Human Resources*, 478 U.S. 251, 253 (1986), in an "implacable fashion," even if this leads to a "harsh result." *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317–318 (1988). The Seventh Circuit's concerns about the practicality of such a rule cannot override the plain text of Appellate Rule 4. The rule's consistent, decades-long use of the word "disposing" as a synonym for the previously used phrase "granting or denying"[11] negates *Titan's* effort to limit the term to "denying."

Applying Appellate Rule 4's plain meaning here, respondent's appeal was untimely. The district court

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[11] In 1993, amendments to Appellate Rule 4(a)(4)(A) replaced the phrase "granting or denying" with the word "disposing." *See supra* note 7.

disposed of the parties' tolling motions in its March 16, 2009 Order. Pet. App. 36a–50a. Therefore, respondent's notice of appeal was due 30 days from March 16, 2009, *i.e.*, by no later than April 15, 2009. Because respondent filed its notice of appeal on April 17, 2009, two days late, that notice was untimely.

CONCLUSION

For the reasons provided above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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March 2011

APPENDIX A

United States Court of Appeals,
Federal Circuit.

EXTREME NETWORKS, INC., Plaintiff-Cross Appellant,

v.

ENTERASYS NETWORKS, INC., Defendant-Appellant.

Nos. 2009-1325, 2009-1346.
Sept. 30, 2010.
Rehearing and Rehearing En Banc Denied Dec. 20, 2010.
Rehearing Denied Dec. 29, 2010.

Appeals from the United States District Court for the Western District of Wisconsin in case no. 07-CV-229, Chief Judge Barbara B. Crabb.Margaret M. Duncan, McDermott Will & Emery LLP, of Chicago, Illinois, argued for plaintiff-cross appellant. With her on the brief were David L. Larson, of Menlo Park, California; and Joel M. Freed, Natalia V. Blinkova, and Bureden Warren, of Washington, DC.

David P. Swenson, Robins, Kaplan, Miller & Ciresi L.L.P., of Minneapolis, Minnesota, argued for defendant-appellant. With him on the brief were Scott M. Flaherty; and Christopher P. Sullivan, William J. Rocha, Rebecca A. MacDowell and Alan E. McKenna, of Boston, Minnesota.

Before RADER, Chief Judge, and LOURIE and PROST, Circuit Judges.

RADER, Chief Judge.

Extreme Networks, Inc. ("Extreme") and Enterasys Networks, Inc. ("Enterasys") accuse each other of patent infringement. The United States District Court for the Western District of Wisconsin granted summary judgment of non-infringement of Enterasys's patents: U.S. Patent Nos. 5,430,727 ("'727 patent") and 5,195,181 ("'181 patent"). *Extreme Networks, Inc. v. Enterasys Networks, Inc.*, 558 F.Supp.2d 909, 924 (W.D.Wis.2008). Before proceeding with trial on Extreme's infringement claims, the district court granted Extreme's motion to exclude Enterasys's expert from testifying. *Extreme Networks, Inc. v. Enterasys Networks, Inc.*, No. 07-cv-229, 2008 WL 4621440, at *2 (W.D.Wis. May 16, 2008). After the jury trial, the district court entered a final judgment of infringement against Enterasys, but denied Extreme's motion for attorney fees. *See Extreme Networks, Inc. v. Enterasys Networks, Inc.*, No. 07-cv-229, 2008 WL 4756498, at *6-7 (W.D.Wis. Oct. 29, 2008).

Because the district court erroneously construed the contested limitation "digest of information," this court vacates the summary judgment as to the ' 181 patent. This court also vacates the denial of Extreme's motion for attorney fees. In all other respects, this court affirms.

I

The '727 patent-"Multiple Protocol Routing"-issued on July 4, 1995, based on a May 19, 1994 application. The '727 patent covers a "brouter," which can operate both as a bridge and a router. Claims 5, 6, and 7 of the '727 patent are at issue on appeal. Claim 5 is representative and recites:

> A device which is capable of acting as a router to forward to and from end systems user data packets and is capable of acting as a bridge to forward between networks user data packets, said device comprising
>
> router circuitry causing said device to act as a router recognizing and forwarding user data packets conforming to a first protocol suite,
>
> *bridge circuitry causing said device to act as a bridge recognizing and forwarding user data packets conforming to at least a second protocol suite,*
>
> control circuitry causing said device to act as a bridge rather than as a router for a user data packet which conforms to said first protocol suite and is addressed to a single address which is not an address of the device.

'727 patent col. 60 ll. 20-34 (emphasis added). Claims 6 and 7 depend from claim 5.

The '181 patent-"Message Processing System Having Separate Message Receiving and Transmitting Processors with Message Processing Being Distributed Between the Separate Processors"-issued on March 16, 1993, based on a January 10, 1992 application. The '181 patent provides a scheme for partitioning workload between receive and transmit processors so that a data packet can quickly and efficiently move through a multiprocessor system. Each receive processor collects information relating to the network protocol processing of a particular data packet into a "digest." '181 patent col. 4 ll. 57-62. "The information placed in the digest comprises information that is necessary for the completion of the processing tasks to be performed by the [transmit processors]." *Id.* col. 4 ll. 62-65.

Claims 1, 6, and 7 of the '181 patent are at issue on appeal. Claim 1 is representative and recites:

> A computer system for transmitting messages in a computer network, which comprises:
>
> > a message receiving processor adapted to receive messages from the computer network;
> >
> > a separate message transmitting processor coupled to the message receiving processor;
> >
> > the message receiving processor operating to perform first preselected

> processing of a message received by the message receiving processor and to generate a *digest* of information relating to the message, *the digest containing network protocol processing information for message transmit processing;*
>
> the message receiving processor transmitting the message and the *digest* o [sic] the message transmitting processor;
>
> the message transmitting processor operation to perform second preselected processing of the message using the network protocol processing information in the *digest*.

'181 patent col. 12 ll. 50-68 (emphases added).

II

On April 20, 2007, Extreme sued Enterasys alleging infringement of three Extreme patents. On May 30, 2007, Enterasys counterclaimed, alleging infringement of the '727 patent, the '181 patent, and a third patent, which Enterasys later voluntarily dismissed. On May 5, 2008, 558 F.Supp.2d 909, the district court granted summary judgment of noninfringement of the ' 727 patent based on its construction of the terms "acting as a bridge" and "bridge circuitry." The district court also granted summary judgment of noninfringement of the '181 patent based on its construction of the term "digest." The district court thus disposed of Enterasys's

infringement claims.

Before holding a trial on Extreme's infringement claims, the district court granted Extreme's motion in limine to preclude Enterasys's expert Barbara Frederiksen from testifying in support of its noninfringement and invalidity defenses. Extreme obtained a verdict in the amount of $201,213. The district court denied Extreme's motion for attorney fees.

Enterasys appeals the district court's grant of summary judgment of non-infringement of the '727 and '181 patents and its decision to exclude Frederiksen's expert testimony. Extreme cross-appeals the denial of its motion for attorney fees.

III

As an initial matter, Extreme argues that this court does not have jurisdiction over this appeal because Enterasys's notice of appeal was untimely. The district court entered judgment on November 5, 2008. The parties then filed post-trial motions, including motions to calculate pre-judgment interest, post-judgment interest, and supplemental damages. The district court entered an order disposing of all such motions on March 16, 2009. The court clerk entered an amended judgment on March 19, 2009. Enterasys filed its notice of appeal on April 17, 2009. Extreme argues that the November 5, 2008 order was a final judgment and that the time to file an appeal re-started on March 16, 2009. If Extreme's assumptions were correct, Enterasys's notice of appeal, which was filed more than thirty days after

the March 16, 2009 order, would be untimely.

A final judgment "ends the litigation on the merits and leaves nothing for the [district] court to do but execute the judgment." *Crown Packaging Tech., Inc. v. Rexam Beverage Can Co.*, 559 F.3d 1308, 1311 (Fed.Cir.2009) (citation omitted). Where substantive issues remain unresolved, a "judgment standing alone as issued by the district court [is] insufficient to establish dismissal of the entire action and ... could not be the basis for providing [the Federal Circuit] with subject matter jurisdiction." *SafeTCare Mfg., Inc. v. Tele-Made, Inc.*, 497 F.3d 1262, 1267 (Fed.Cir.2007).

"Prejudgment interest is an element of complete compensation." *West Virginia v. United States*, 479 U.S. 305, 310, 107 S.Ct. 702, 93 L.Ed.2d 639 (1987). "Prejudgment interest serves to compensate for the loss of use of money due as damages from the time the claim accrues until judgment is entered, thereby achieving full compensation for the injury those damages are intended to redress." *Id.* at 310 n. 2, 107 S.Ct. 702. Therefore, courts should calculate prejudgment interest before determining the amount of damages that would fully compensate the patentee for the infringer's use of the patented invention.

The November 5, 2008 judgment did not constitute a final judgment because it left unresolved prejudgment interest, even though the parties had previously notified the district court of their unresolved dispute over its calculation. The district court did not calculate prejudgment interest until

the March 16, 2009 order. Because the March 19, 2009 amended judgment resolved all pending issues, under the facts of this case, it is the only final judgment. Because Enterasys filed its notice of appeal within thirty days thereafter, this court has jurisdiction.

IV

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56. Thus, a court may grant summary judgment "when no reasonable jury could return a verdict for the nonmoving party." *Revolution Eyewear, Inc. v. Aspex Eyewear, Inc.*, 563 F.3d 1358, 1365 (Fed.Cir.2009) (citations omitted). This court reviews a grant of summary judgment of non-infringement without deference. *O2 Micro Int'l, Ltd. v. Monolithic Power Sys.*, 467 F.3d 1355, 1359 (Fed.Cir.2006). This court also reviews claim construction without deference. *Cybor Corp. v. FAS Techs., Inc.*, 138 F.3d 1448, 1456 (Fed.Cir.1998) (en banc).

Claims 5, 6, and 7 of the '727 patent include the limitation: "bridge circuitry causing said device to act as a bridge recognizing and forwarding user data packets conforming to at least a second protocol suite." '727 patent col. 60 ll. 20-39. The district court held that the brouter "recognizes" the type of protocol suite to which a data packet belongs and decides whether to forward the data packet as a

bridge or a router based on the protocol suite. The district court granted summary judgment of non-infringement because it found that the accused Extreme devices do not base their decisions on the protocol suite.

The district court correctly construed the "bridge circuitry" limitation. The parties agree that the brouter has some decision-making capabilities. The claim language implies that the recognition of the second protocol suite triggers the brouter's decision to act as a bridge or a router because it does not specify any other criteria by which the brouter can determine how it will forward the data packets.

The specification supports this interpretation of "bridge circuitry." The only disclosed embodiment of a brouter "is arranged to treat TCP/IP packets as if the router were a normal IP router and to treat all other packets as if the router were a bridge." '727 patent col. 50 l. 67-col. 51 l. 2. The brouter treats a data packet conforming to TCP/IP by routing it and a data packet conforming to a different protocol suite by bridging it. The specification does not disclose any other basis for deciding whether to route or bridge a data packet. Although this court must be careful not to read an embodiment into a claim, the specification of the '727 patent supports the causal connection between the recognition of the data packet's protocol suite and the determination whether to act as a router or a bridge. Accordingly, the district court correctly held that the claimed brouter must make a decision whether to bridge or route a data packet based on the protocol suite to which the data packet conforms.

Enterasys also argues that there is a genuine issue of material fact as to how Extreme's accused devices decide whether to route or bridge a data packet. In its summary judgment motion, Extreme argued that its devices forward the incoming data packets regardless of their protocol suites. In response, Enterasys merely alleged that the accused devices ascertain the data packets' protocol suites before routing or bridging them. Enterasys made no attempt to establish that the determination of the protocol suite has any bearing on the devices' decision to "act as a bridge." Accordingly, there is no genuine issue of material fact.

Finally, Enterasys argues it is entitled to pursue additional discovery on Extreme's devices because the district court changed its claim construction of "bridge circuitry" over time. The district court did not change its construction of "bridge circuitry." Also, this court finds that Enterasys could have conducted its discovery in anticipation of the final claim construction. Enterasys never sought relief on the ground that it had been unable to obtain the necessary discovery to dispute that Extreme's devices do not use the protocol suite in deciding how to forward data packets. Enterasys had a full opportunity to take the discovery it now demands. Thus, Enterasys is not entitled to additional discovery. Accordingly, this court affirms the summary judgment of non-infringement of the '727 patent.

V

Claims 1, 6, and 7 of the '181 patent recite: "the message receiving processor ... to generate *a digest of information* relating to the [received] message, the digest containing network protocol processing information for message transmit processing." '181 patent col. 12 ll. 50-68, col. 14 ll. 18-43. The district court explained in its summary judgment order that because the digest "contain[s]" network protocol processing information, "the digest is a structure and not the contents of the structure." *Extreme Networks*, 558 F.Supp.2d at 920. The district court granted summary judgment of non-infringement based on Enterasys's alleged concession that Extreme's devices do not have such a structure.

The parties agree that the term "digest" does not have a specific definition in the relevant art. The term "digest" ordinarily means a collection of information. *See* Merriam-Webster's Collegiate Dictionary (10th ed.1993) (defining "digest" as "a summation or condensation of a body of information"); Random House Webster's College Dictionary (1991) (defining "digest" as "a collection or compendium, as of literary or scientific matter, esp[ecially] when classified or condensed"). A "digest," which is a condensation of a body of information relating to the received message, would logically be a set of data rather than a structure containing that data. The district court erred by focusing on the claim term "containing" and concluding that something "containing" information cannot also be information. To the contrary, the term "containing" does not indicate whether the "digest" is

a structure or the contents of a structure.

Moreover, the following passage in the specification clarifies that a "digest" is a collection of information relating to network protocol processing of a particular message:

> [T]he present invention arranges each [receiving processor] to *collect, into a digest, information relating to network protocol processing of a particular message,* obtained via sequential byte processing of the message at the time of reception of the message.... *[This] digest can include, for example, certain information* from the data link layer header of a received message. *The data link information can include, for example, last hop information* that is used by the processor of the transmitting line interface card in the transmission of the message."

'181 patent col. 4 ll. 57-62, col. 4 l. 68-col. 5 l. 5 (emphases added). "[The] digest can include ... certain information" just like "[t]he data link information can include ... last hop information." *Id.* This parallel language further suggests that the digest, like the data link information, is information. Specifically, the digest contains "network protocol processing information" that is related to processing of the message but may contain other information that could assist other processors in processing the message. Accordingly, this court vacates the summary judgment of non-infringement of the '181 patent.

VI

Enterasys has the burden of establishing that Frederiksen's expert testimony is admissible based on her "knowledge, skill, experience, training, or education" in the relevant technology. Fed.R.Evid. 702. Courts must determine whether expert testimony is reliable by assessing whether the expert is qualified in the relevant field. *Smith v. Ford Motor Co.*, 215 F.3d 713, 718 (7th Cir.2000). A district court's decision to preclude expert testimony is an evidentiary issue, which this court reviews under the law of the regional circuit. *Research Corp. Techs. v. Microsoft Corp.*, 536 F.3d 1247, 1255 (Fed.Cir.2008). The U.S. Court of Appeals for the Seventh Circuit reviews evidentiary rulings for an abuse of discretion. *Von der Ruhr v. Immtech Int'l, Inc.*, 570 F.3d 858, 862 (7th Cir.2009).

The district court did not abuse its discretion by excluding Frederiksen's testimony on the ground that she was not qualified as an expert in the relevant art. Both parties agree that a person of ordinary skill in the art pertinent to Extreme's patents would have a substantial background in switches, bridges, and routers. Frederiksen opined that an ordinary artisan was:

> An individual with a Bachelor of Computer Science or computer engineering degree, or equivalent experience, and 2-3 years experience in the computer industry *working on the design or development of high speed switches, bridges, or routers* for wide area networks (e.g. frame relay, ATM); local area

> networks (e.g. Ethernet, FDDI, token ring, etc.); or military networks.

(J.A. 1350-01 (emphasis added)). Extreme's expert, Dr. Nathaniel Davis, identified a similar set of criteria for defining the person of ordinary skill, although his definition included somewhat more industry experience.

Frederiksen would not qualify as a person of ordinary skill in the relevant art even under her own proposed definition. Frederiksen received an Associate of Applied Science degree in Computer Programming. She worked as a system administrator for several corporations, but she never seems to have worked on "the design or development of high speed switches, bridges, or routers." General experience in a related field may not suffice when experience and skill in specific product design are necessary to resolve patent issues. *See, e.g., Flex-Rest, LLC v. Steelcase, Inc.*, 455 F.3d 1351, 1360-61 (Fed.Cir.2006) (affirming exclusion of an ergonomics expert where the invention at issue related to an ergonomic keyboard design). Therefore, the district court did not abuse its discretion by ruling that Frederiksen was an unqualified expert.

VII

This court affirms the summary judgment of noninfringement of the '727 patent and the decision to exclude Frederiksen's expert testimony. This court vacates the summary judgment of non-infringement of the '181 patent and thus vacates the denial of Extreme's motion for attorney fees as premature

given the fact that infringement of the '181 patent may need to be redecided. This court remands the case for further proceedings consistent with the opinion.

AFFIRMED-IN-PART, VACATED-IN-PART, AND REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

EXTREME NETWORKS, INC.,

Plaintiff,

v.

ENTERASYS NETWORKS, INC.

Defendant.

OPINION AND ORDER

07-cv-229-bbc

A jury found that several routers sold by defendant Enterasys Networks, Inc. infringed one or more of three patents owned by plaintiff Extreme Networks, Inc. relating to management of network traffic: U.S. Patents Nos. 6,104,700, 6,678,248, and 6,859,438. After the verdict, defendant renewed its motion for judgment as a matter of law under Fed. R. Civ. P. 50 and plaintiff moved for a permanent injunction and attorney fees. For the reasons stated below, the motions for judgment as a matter of a law and attorney fees will be denied; the motion for a permanent injunction will be granted in part.

A. Defendant's Motions for Judgment as a Matter of Law

The first question is whether defendant properly preserved all of the arguments it raised in its Rule

50(b) by first asserting them in one of its Rule 50(a) motions. Plaintiff says that defendant waived the following arguments in its Rule 50(b) motion:

- plaintiff failed to show during trial that the weighted fair queuing and bw-limit functions of the Matrix router satisfy the "QoS metric" limitation in claim 15 of the '248 patent;

- plaintiff failed to show during the trial that any of the accused products "remove the data packet from the queue if a difference between the current measure and the minimum QoS falls within a threshold," as required by claim 15 of the '248 patent;

- plaintiff failed to show that the Expedition router has a "scheduler as required by claim 5 of the '438 patent;

- plaintiff failed to show at trial that the Matrix router is designed for use in a network employing a non-deterministic access protocol, as required by claim 21 of the '700 patent.

I agree with plaintiff that defendant did not raise any of these arguments in its Rule 50(a) motions, which means it may not assert them now. Laborers' Pension Fund v. A St C Environmental, Inc., 301 F.3d 768 (7th Cir. 2002); Mid-America Tablewares, Inc. v. Mogi Trading Co., 100 F.3d 1353, 1363-64 (7th Cir. 1996); Downes v. Volkswagen of America, Inc., 41 F.3d 1132, 1139-40

(7th Cir. 1994). Defendant argues that its Rule 50(a) motions were sufficient because in each of them it argued that plaintiff had failed to meet the same claim elements that it identifies as deficient in its Rule 50(b) motion. The rule itself makes it clear that defendant is wrong. A Rule 50 motion must "specify . . . the law and facts that entitle the movant" to judgment as a matter of law. Fed. R. Civ. P. 50(a)(2). In other words, the motion must be specific enough to give notice to the plaintiff of the hole in its case so that it can attempt to put in more evidence while there is still an opportunity to do so. Defendant cannot preserve all possible arguments simply by listing the elements of a claim and arguing generally that the plaintiff did not meet them. This gives the plaintiff no notice of the law *or* facts that might entitle defendant to judgment as a matter of law.

Defendant raised several other arguments for the first time in its reply brief; those arguments are waived as well.

The only argument advanced by defendant that it did not forfeit is that plaintiff failed to adduce sufficient evidence that the Matrix X and X-Pedition routers provide a "minimum bandwidth" or "minimum QoS" as required by claim 15 of the '248 patent, claim 5 of the '438 patent and claims 21 and 29 of the '700 patent. The record at trial on these questions was little different from summary judgment. Plaintiff relied again on the documents created by defendant as well as Broadcom, the manufacturer of the chips in defendant's products. Plaintiffs expert, Daniel Davis, testified that these documents showed that the weighted fair queuing

function of defendants' products satisfied the "minimum QoS" and "minimum bandwidth" elements. Although defendant disagrees with that expert's assessment, it fails to show that the jury was not entitled to credit the testimony.

Defendant also challenges the jury's award of $201,213 in compensatory damages. Although it was not required to, the jury wrote that it was awarding $67,071 "for each of the three patents infringed." Defendant argues that the jury should not have awarded an equal amount of damages for each patent because the X-Pedition routers were not an accused device with respect to the '700 patent.

The problem with this argument is that it ignores the standard of review. To side with defendant on this issue, I would have to find that no rational jury could have found that plaintiff was entitled to $67,071 for the defendant's infringement of the '700 patent. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 151 (2000); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Defendant does not acknowledge this standard, much less develop an argument that it has been met. Rather, defendant simply assumes that the jury used identical methodology in awarding damages for each patent. However, that is not an assumption defendant is entitled to make: the jury did not disclose its methodology and the verdict form did not require it to. Because defendant fails to develop an argument that no rational jury could have awarded the damages it did for the infringement of the '700 patent, that argument is waived.

B. Plaintiff's Motion for a Permanent Injunction

The same standard for obtaining a permanent injunction applies in patent cases as in any other case. The plaintiff must show that (1) it has suffered an irreparable injury; (2) the remedies available at law are inadequate to compensate for that injury; (3) considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) the public interest would not be disserved by a permanent injunction. eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006).

Defendant fills a 40-page brief with reasons it believes the court should not grant an injunction, but a number of them are simply reargruments of the merits or are otherwise unrelated to the four-part test from eBay. I have disregarded these. With respect to the factors that are relevant to determining whether injunctive relief is appropriate, it is undisputed that plaintiff and defendant are competitors in the router market and that plaintiff's routers embody the patented technology. Thus, this case is little different from Innogenetics, N.V. v. Abbott Laboratories, 2007 WL 4960850, *25 (W.D.Wis. 2007), in which I concluded that a patent owner had shown irreparable harm and an inadequate remedy at law because the parties were competitors. I noted that a "plaintiff is harmed when defendant sells directly competing products. . . . [I]ts reputation and market share are at stake. Its consumer base sees the products as plaintiffs. Its reputation for innovation and being a market leader are affected when defendant cuts into its market

share. . . . Plaintiff has shown that money damages alone would not remedy its injury." Id. at *25-26. The facts are the same in this case with one important exception: the jury did not award plaintiff damages for future violations as the jury in Innogenetics did. It was because the jury awarded damages for a "long-term license to sell [accused] products" in that case that the court of appeals concluded that a permanent injunction was unnecessary. Innogenetics, N.V. v. Abbott Laboratories, 512 F.3d 1363, 1379-80 (Fed. Cir. 2008). In this case, defendant identifies no long-term license fee that would make plaintiff whole.

Further, defendant identifies no unfair hardship it would experience or any disservice to the public interest that would occur if a properly tailored injunction was issued. Although it is true that in eBay, the Court held that an injunction should not issue automatically in every case of infringement, the reasons identified by several of the justices for denying injunctive relief are not present in this case. E.g., eBay, 547 U.S. at 396 (Kennedy, J., concurring) (damages may be sufficient when plaintiff "use[s] patents not as a basis for producing and selling goods but, instead, primarily for obtaining licensing fees")

The remaining question is what the scope of the injunction should be. Plaintiff has proposed the following order with respect to injunctive relief:

> Additionally, the Court finds that a PERMANENT INJUNCTION for Enterasys' infringement of the '700, '248 and '438

patents is warranted. Accordingly, IT IS FURTHER ORDERED, ADJUDGED AND DECREED that:

1. Enterasys and its subsidiaries, parents, affiliates, officers, directors, agents, servants, representatives, attorneys, employees, licensors, licensees, successors in interest and assigns, and those persons in active concert or participation with them who receive actual notice of this Order (collectively, "Enterasys"), are hereby restrained and permanently enjoined, pursuant to Federal Rule of Civil Procedure 65(d) and 35 U.S.C. § 283, from manufacturing, using, offering to sell, or selling in the United States, or importing into the United States, (i) the X-Pedition 8000, the X-Pedition 8600, and the Matrix X series products ("the Accused Products"), either alone or in combination with any other product; (ii) any switch, router or data packet forwarding device capable of performing traffic shaping and/or weighted fair queuing in a manner substantially similar to the Accused Products; and (iii) any other existing or future product that is not more than a colorable variation of the Accused Products (the products described in (i), (ii) and (iii) above are collectively referred to as "the Infringing Products").

2. Enterasys is further restrained and permanently enjoined from making, using, offering to sell, or selling in the United

States products or services associated with the Infringing Products, or products or services that are not more than colorable variations thereof (collectively, the "Related Infringing Products and Services").

3. Enterasys is further restrained and permanently enjoined from inducing infringement of the Infringed Claims by encouraging, supporting, aiding, or abetting the manufacture, use, offer for sale, sale or importation for sale of the Infringing Products and/or the Related Infringing Products and Services in the United States.

4. Enterasys is further restrained and permanently enjoined from contributing to the infringement of the Infringed Claims by manufacturing, using, offering for sale, selling or importing for sale the Infringing Products and/or the Related Infringing Products and Services in the United States.

5. Enterasys shall destroy its existing inventory of the Infringing Products within ten days of this Order.

6. If Enterasys intends to make, use, sell, or offer for sale in the United States, or import into the United States, a switch, router or data packet forwarding device that it contends does not infringe the Infringed Claims, Enterasys shall, sixty (60) days prior to offering for sale the product to a U.S. customer, (i) make the product available for

Extreme Networks' inspection; and (ii) provide sufficient documentation relating to the product as reasonably requested by Extreme Networks, pursuant to the terms of the Protective Order in this case.

7. Within ten days of this Order, Enterasys shall provide written notice of this Order, and the injunction ordered herein, to its subsidiaries, parents, affiliates, officers, directors, agents, servants, representatives, attorneys, employees, licensors, licensees, successors in interest and assigns, and those persons in active concert or participation with them, including any and all manufacturers, distributors, retailers, and service providers who have been involved in the making, using, selling, offering for sale or importing of any Infringing Products in the United States since April 20, 2007; all other persons or entities involved in anyway with the making, using, selling, offering for sale or importing of any Infringing Products in the United States since April 20, 2007; and all entities that have purchased the Infringing Products in the United States.

8. Enterasys shall take whatever means are necessary or appropriate to ensure that this Order is properly complied with.

9. This injunction shall run until the expiration of the Extreme Networks' patents, which is February 3, 2018, with

respect to the '700 and '438 patents, and March 16, 2020, with respect to the '248 patent.

10. This Court retains jurisdiction over Enterasys to enforce any and all aspects of this Order for Final Judgment and Permanent Injunction.

11. The Court further retains jurisdiction to award Extreme Networks amounts for supplemental damages, interest, costs, attorneys fees and such other or further relief as may be just and proper.

12. This is a Final Judgment and is appealable.

I agree with defendant that the injunction is overbroad in its current form. The reason is simple: the scope of an injunction must be tailored to the scope of the violation found. e360 Insight v. The Spamhaus Project, 500 F.3d 594, 604 -605 (7th Cir. 2007).

In this case, the jury found only that a limited subset of defendant's products infringed several claims of plaintiff's patents. It did not find that its patents covered "any switch, router or data packet forwarding device capable of performing traffic shaping and/or weighted fair queuing," that any "products or services associated with the" accused products constituted infringement or that defendant had engaged in indirect infringement of any kind. Thus, the portions of plaintiff's proposed order seeking to enjoin defendant from engaging in these

activities must be deleted. (The Court of Appeals for the Federal Circuit has held that the injunction may extend to products "not more than colorably different from the adjudicated" products, International Rectifier Corp. v. IXYS Corp., 383 F.3d 1312, 13 16 (Fed Cir. 2004), so I have left that language in the order.)

Plaintiff says that the injunction should extend beyond what the jury found because plaintiff declined to litigate claims for indirect infringement "in order to streamline the trial." Dkt. #411, at 20. Apparently, plaintiff's argument is that it should receive a free pass at proving a violation because it was motivated by altruism. But it makes no difference whether plaintiff decided to drop these claims as an act of deep concern for the court and the jury, a calculated trial strategy or simply a realization that it could not win the claims. The point is that plaintiff did not press the claims and it must live with the consequences of that choice.

I also agree with defendant that the list of entities and person it seeks to enjoin is too broad. Rule 65 permits an injunction to extend to "the parties," "the parties' officers, agents, servants, employees, and attorneys" and "other persons who are in active concert or participation with" the listed persons. The injunction will be limited accordingly.

Plaintiff does not even try to defend its proposed paragraph six, which requires defendant to allow plaintiff to inspect any future "switch, router or data packet forwarding device," or the proposed requirement that defendant provide notice of the

order to "all other persons or entities involved in any way with the making, using, selling, offering for sale or importing of any Infringing Products in the United States since April 20, 2007; and all entities that have purchased the Infringing Products in the United States." Those provisions are overbroad and will be omitted.

I do not agree with the remaining objections raised by defendant. First, defendant says that the injunction should not apply to the X-Pedition routers because it no longer manufactures or sells those routers. This is an argument that the need for an injunction is moot. Plaintiff's burden in prevailing on that argument is "a heavy one." County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979). It would have to show that it was "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources, 532 U.S. 598, 609 (2001) (internal quotations omitted). See also Global Relief Foundation, Inc. v. O'Neill, 315 F.3d 748, 751 (7th Cir. 2002) (case was not moot "while any possibility remained" that defendant would revert to past conduct). Because defendant has not met this burden (or even attempted to), I decline to exclude the X-Pedition routers from the scope of the injunction.

Also, the proposed order to destroy the accused products that remain in defendant's inventory is similar to the one in Innogenetics. Defendant identifies no noninfringing uses for these products, so there is no valid reason to keep them. However, I agree with defendant that the order should run from

the final resolution of any appeal by defendant rather than from the date of this opinion.

D. Attorney Fees

Plaintiff seeks attorney fees under 35 U.S.C. § 285 and 28 U.S.C. § 1927. Perhaps not surprisingly, plaintiff devotes more pages to this issue than it does to any other. Unfortunately, what plaintiff and so many other prevailing parties do not seem to realize is that attorney fees are not awarded as a matter of course in patent cases. Sections 285 and 1927 are not fee shifting statutes like 42 U.S.C. § 1988. They are sanctions for asserting a frivolous position or engaging in serious misconduct before the court or the PTO. Counsel waste their own time and their client's money when they file motions under these statutes in run-of-the-mill cases or cases in which both sides engaged in questionable litigation tactics.

Section 285 applies to "exceptional" cases only. There was nothing "exceptional" about this case, at least nothing that would warrant an award of attorney fees to plaintiff. Both sides were equally tenacious. Although plaintiff may have carried the day in most respects, this does not mean automatically that defendant's positions had no merit. Plaintiff points to a number of arguments made by defendant that were criticized by the court, but if this were enough to justify fees under § 285, plaintiff would be in little better position than defendant. Plaintiff advanced several of its own indefensible positions throughout the case, such as its argument that it was entitled to assert new claims at any point in the litigation.

Similarly, plaintiff accuses defendant of engaging in "gamesmanship" in discovery and the rest of the case, but its memory is highly selective. Plaintiff engaged in many of the same practices of which it now accuses defendant. For example, plaintiff refused to agree to a dismissal with prejudice of one of defendant's counterclaims unless defendant agreed to release plaintiff from liability not just *with respect* to plaintiff's current products but to all products it might manufacture in the future. Plaintiff has never attempted to justify this refusal as being grounded in a reasonable interpretation of the law.

Like § 285, the application of § 1927 is very limited. It allows a court to award attorney fees against a party "who . . . multiplies the proceedings in any case unreasonably and vexatiously." Interestingly enough, § 1927 has been raised in this court almost exclusively in the context of patent cases. E.g., Silicon Graphics, Inc. v. ATI Technologies, Inc., 569 F. Supp. 2d 1819, 822 (W.D. Wis. 2008) (denying motion for attorney fees under § 1927 in patent case); Vehicle IP, LLC v. General Motors Corp., 2008 WL 2273682, 1 (W.D. Wis. 2008) (same); Thermal Design, Inc. v. Indoor Courts of America, Inc., 2004 WL 1638180, *2 (W.D. Wis. 2004) (same); Bruno Independent Living Aids, Inc. v. Acorn Mobility Services Ltd., 277 F. Supp. 2d 965, 967 (W.D. Wis. 2003) (same).

Again, plaintiff's request for fees under § 1927 is somewhat ironic. After all, it was plaintiff that attempted unsuccessfully to expand the scope of the lawsuit just before summary judgment and then

refused to take no for an answer by filing an equally unsuccessful motion for reconsideration when its motion to amend its complaint was denied.

In short, this case was hardly a model for smooth, respectful and intelligent litigation. But the fault for the case's problems cannot be laid on defendant's door step alone. Both sides should have learned from this case how not to litigate a patent lawsuit in the future.

ORDER

IT IS ORDERED that

1. Defendant Enterasys, Inc.'s renewed motion for judgment as a matter of law, dkt. #409, and its request for a hearing on that motion, dkt. #415, are DENIED. The clerk of court is directed to enter judgment in the amount of $201,213 in favor of plaintiff on its claims that defendant's Matrix X routers have infringed claims 21 and 29 of U.S. Patent No. 6,104,700, that the Matrix X, X-Pedition 8000 and X-Pedition 8600 routers have infringed claim 15 of U.S. Patent No. 6,678,248 and that the Matrix X, X-Pedition 8000 and X-Pedition 8600 routers have infringed claim 5 of U.S. Patent No 6,859,438. In addition, the clerk is directed to enter judgment in favor of plaintiff on defendant's counterclaims for infringement of U.S. Patents Nos. 5,195,181 and 5,430,727.

2. The clerk is directed to enter judgment in favor of defendant on plaintiff's claims that the Matrix X, X-Pedition 8000 and X-Pedition 8600 routers infringe claim 1 of the '248 patent and claim

1 of '438 patent. These claims were dismissed by plaintiff with prejudice during the trial.

3. Plaintiff's motion for attorney fees, dkt. #412, is DENIED.

4. Plaintiff's motion for a permanent injunction, dkt. #405, is GRANTED IN PART. Defendant is ENJOINED as follows:

- Defendant, defendant's officers, agents, servants, employees, attorneys and other persons who are in active concert or participation with them who receive actual notice of this order are permanently enjoined from manufacturing, using, offering to sell, or selling in the United States, or importing into the United States, the X-Pedition 8000, the X-Pedition 8600, and the Matrix X series products, either alone or in combination with any other product and any other existing or future product that is not more than a colorable variation of the X-Pedition 8000, the X-Pedition 8600 and the Matrix X series products.

- Defendant shall destroy its existing inventory of the X-Pedition 8000, the X-Pedition 8600 and the Matrix X series products within ten days of the final resolution of any appeal by defendant.

- Within ten days of this order, defendant shall provide written notice of the order and injunction to its officers, agents, servants, employees, attorneys and other persons who are in active concert or participation with them.

5. This injunction shall run until the expiration of plaintiff s patents, which is February 3, 2018, with respect to the '700 and '438 patents, and March 16, 2020, with respect to the '248 patent.

6. This court retains jurisdiction to enforce any and all aspects of this order and to award plaintiff supplemental damages, interest or costs.

Entered this 28th day of October, 2008.

BY THE COURT:

/s/
BARBARA B. CRABB
District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

EXTREME NETWORKS, INC.,

Plaintiff,

v.

ENTERASYS NETWORKS, INC.,

Defendant.

JUDGMENT IN A CIVIL CASE

Case No. 07-cv-229-bbc

This matter came before the court and a jury with District Judge Barbara B. Crabb presiding. The issues have been tried and the jury has rendered a verdict.

IT IS ORDERED AND ADJUDGED that judgment is entered:

1. Dismissing defendant Enterasys Networks, Inc.'s counterclaims for infringement of U.S. Patents Nos. 6,041,042, 5,195,181 and 5,430,727 with prejudice;

2. Dismissing plaintiff Extreme Networks, Inc.'s claims for invalidity of the '042, '181 and '727 patents without prejudice;

3. Limiting plaintiffs damages for infringement to those plaintiff incurred after it filed this lawsuit on April 20, 2007;

4. In favor of defendant on plaintiffs claims that the Matrix X, X-Pedition 8000 and X-Pedition 8600 routers infringe claim 1 of the '248 patent and claim 1 of the '438 patent; and

5. In favor of plaintiff Extreme Networks, Inc. against defendant Enterasys Networks, Inc. in the amount of $201,213.00 on plaintiff's claims that defendant's Matrix X routers have infringed claims 21 and 29 of U.S. Patent No. 6,104,700, that the Matrix X, X-Pedition 8000 and X-Pedition 8600 routers have infringed claim 15 of U.S. Patent No. 6,678,248 and that the Matrix X, X-Pedition 8000 and X.-Pedition 8600 routers have infringed claim 5 of U.S. Patent No. 6,859,438.

IT IS FURTHER ORDERED AND ADJUDGED that defendant is permanently enjoined as follows:

- Defendant, defendant's officers, agents, servants, employees, attorneys and other persons who are in active concert or participation with them who receive actual notice of this judgment are permanently enjoined from manufacturing, using, offering to sell, or selling in the United States, or importing into the United States, that X-

Pedition 8000, the X-Pedition 8600, and the Matrix X series products, either alone or in combination with any other product and any other existing or future product that is not more than a colorable variation of the X-Pedition 8000, the X-Pedition 8600, and the Matrix X series products.

- Defendant shall destroy its existing inventory of the X-Pedition 8000, the X-Pedition 8600, and the Matrix X series products within ten days of the final resolution of any appeal by defendant.

- Within ten days of the court's order, defendant, shall provide written notice of the order and injunction to its officers, agents, servants, employees, attorneys and other persons who are in active concert with them.

- This injunction shall run until the expiration of plaintiff's patents, which is February 3, 2018, with respect to the '700 and '438 patents, and March 16, 2020, with respect to the '248 patent.

Approved as to form this 3d day of November, 2008.

/s/
Barbara B. Crabb
District Judge

/s/ 11-5-2008
Joel W. Turner Date
Acting Clerk of Court

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

EXTREME NETWORKS, INC.,

Plaintiff,

v.

ENTERASYS NETWORKS, INC.,

Defendant.

OPINION AND ORDER

07-cv-229-bbc

A jury awarded plaintiff Extreme Networks, Inc. approximately $200,000 for defendant Enterasys Networks, Inc.'s infringement of three patents relating to management of network traffic: U.S. Patents Nos. 6,104,700, 6,678,248, and 6,859,438. In an order dated October 29, 2008, I denied defendant's motion for judgment as a matter of law, granted in part plaintiff's motion for a permanent injunction and denied plaintiff's request for attorney fees. Dkt. #436. Now before the court are the following motions:

- Defendant's motion for a new trial and request for a hearing (dkt. #451);

- Defendant's motion to modify the terms on the injunction (dkt. #438);

- Plaintiff's motion to modify the terms of the injunction (dkt. #446);

- Defendant's motion to stay the injunction pending appeal (dkt. #440);

- Plaintiff's motion to strike the declaration of defendant's expert, filed in support of defendant's motions to modify and stay the injunctions (dkt. #448);

- Plaintiff's motion for supplemental damages and interest (dkt. #460).

I have stayed the injunction pending resolution of these motions. Dkt. #445.

For the reasons discussed below, I will deny defendant's motion for a new trial, plaintiff's motion to modify the injunction and plaintiff's motion to "strike" the affidavit of defendant's expert; I will grant in part defendant's motion to modify the injunction and plaintiff's motion for supplemental damages and interest; and I will grant defendant's motion to stay the injunction pending appeal.

I. Defendant's Motion for a New Trial

A court may grant a new trial if the verdict is against the clear weight of the evidence or if the trial was unfair to the moving party. David v. Caterpillar, 324 F.3d 851, 863 (7th Cir. 2003). As defendant acknowledges, many of its arguments for

a new trial are the same arguments that I rejected in the context of its Rule 50 motion. It is unnecessary to consider these arguments again. Williams v. Liefer, 491 F.3d 710, 716 (7th Cir. 2007). I consider the few remaining arguments below.

A. Testimony of plaintiff's expert

The gist of defendant's argument on this issue is that the court erred in allowing plaintiff's expert, Nathaniel Davis, to use documents prepared by plaintiff and Broadcam to give opinions about the way defendant's products functioned. This is an only slightly repackaged version of an argument it made at summary judgment and in its Rule 50 motions. Again, defendant cites no authority for the proposition that plaintiffs method of proof was inadequate as a matter of law. To the extent defendant believed that its own documents did not accurately describe how its products function, it was free to challenge Davis's conclusions with its own evidence of the actual functioning of the devices. It is not entitled to a new trial simply because the jury did not find its presentation persuasive.

Defendant also says that it was error to allow Davis to testify at all because he did not meet the standard for a person of ordinary skill in the art. This is an odd argument for defendant to be making in the context of a Rule 59 motion because it never raised the argument before. Defendant attempts to justify the untimely nature of this argument through a convoluted discussion regarding a change that plaintiff made to its proposed jury instructions for the meaning of "person of ordinary skill in the art."

This is nonsense. At no point was defendant bound by plaintiffs understanding of that term; defendant had an obligation to advocate its own view of the correct instruction. If defendant believed that Davis was not a person of ordinary skill in the art, it should have raised that issue in limine rather than wait until it was too late to do anything about it. That argument is forfeited.

B. Exclusion of defendant's expert

At the final pretrial conference, I granted plaintiffs motion to exclude the testimony of defendants' expert Barbara Fredericksen on the ground that defendant had failed to show that she was qualified to testify about issues related to this case. The materials it submitted in response to plaintiffs motion in limine simply did not provide a basis to conclude that her testimony would assist the jury in determining infringement or invalidity. My explanation for this conclusion is set forth in the final pretrial conference order, dkt. #348, and on the record at the conference. There is no need to repeat that discussion here. To the extent defendant is raising new arguments to bolster its position, it has forfeited these by failing to present them before the in limine ruling.

C. Evidentiary objections

Defendant raised two evidentiary objections in its opening brief, one related to admission of a Broadcom document "PX 633" and the other relating to the testimony of Stephen Haddock. Neither of these arguments made much sense. In any event,

defendant abandoned these objections in its reply brief by failing to discuss them at all despite a lengthy defense of the evidence by plaintiff in its brief. Cincinnati Insurance Co. v. Eastern Atlantic Insurance Co., 260 F.3d 742, 747 (7th Cir. 2001).

D. Conduct of plaintiff's counsel

Defendant argues that two actions by counsel for plaintiff during the trial entitle it to a new trial: (1) making remarks expressing "disbelief at the content of [defendant's counsel's] closing argument"; and (2) communicating with plaintiff's expert during a break. Again, defendant abandoned these arguments in its reply brief, but they are frivolous in any event. To begin with, defendant did not object to any statements counsel made during closing arguments; even if it had, there was nothing out of the ordinary about the comments of plaintiffs counsel. When counsel for defendant argued in its closing that the jury must return a verdict in defendant's favor if the jury did not understand plaintiff's evidence, counsel for plaintiff responded, unsurprisingly, that defendant did not think the jury was "smart enough" to understand the case. The jury was entitled to evaluate that characterization for itself. Although I agree with defendant that it was inappropriate for plaintiff's counsel to speak to his expert during a break, the expert testified under oath that the conversation was unrelated to the substance of his testimony. It is difficult to understand how such a conversation could have had any prejudicial effect on defendant's case.

II. Motions to Modify the Injunction

The October 29 order included the following injunction:

- Defendant, defendant's officers. agents, servants, employees, attorneys and other persons who are in active concert or participation with them who receive actual notice of this order are permanently enjoined from manufacturing. using, offering to sell, or selling in the United States, or importing into the United States, the X-Pedition 8000, the X-Pedition 8600, and the Matrix X series products, either alone or in combination with any other product and any other existing or future product that is not more than a colorable variation of the X-Pedition 8000, the X-Pedition 8600 and the Matrix X series products.

- Defendant shall destroy its existing inventory of the X-Pedition 8000, the X-Pedition 8600 and the Matrix X series products within ten days of the final resolution of any appeal by defendant.

- Within ten days of this order, defendant shall provide written notice of the order and injunction to its officers, agents, servants, employees, attorneys and other persons who are in active concert or participation with them.

Both parties seek to modify the injunction. Defendant asks that it be permitted to do four things prohibited by the injunction:

> 1. Use Matrix X routers and X-Pedition routers, either those at its own facility or those of its customers, to perform diagnostic testing as part of providing customer service to its past/existing customers who identify problems with these products to Enterasys;
>
> 2. Use Matrix X routers and X-Pedition routers in Enterasys' own internal network;
>
> 3. Allow Enterasys to sell Matrix X routers to third party resellers, where those products are to be resold to the federal government; and
>
> 4. More generally, allow Enterasys to use Matrix X routers and X-Pedition routers in the United States.

Dkt. #439, at 2. Plaintiff's motion is the inverse of defendant's first request. Plaintiff wishes to expand the injunction so that defendant is enjoined from selling, making or using "component, repair or replacement parts for the Infringing Products or repair or maintenance services for the Infringing Products."

Defendant's first two requests are reasonable modifications. Plaintiff is simply twisting the knife by objecting to these requests and seeking to prevent

defendant from servicing customers and using its products internally. Plaintiff identifies no harm that it will suffer if the injunction is modified in these ways; its only benefit is to cripple defendant in maintaining relationships with its customers and make it more difficult generally for defendant to conduct business. The purpose of an injunction is not to punish the defendant but to prevent irreparable harm to the plaintiff. Because plaintiff identifies no such harm with respect to defendant's first two requests, I will grant that part of defendant's motion and deny plaintiff's motion to modify the injunction.

Defendant's third and fourth requests for modification will be denied. With respect to its fourth request, defendant fails to identify any legitimate "use" of the infringing products that is not covered by its first and second requests. Thus, that request will be denied as unnecessary. Defendant relies on 28 U.S.C. § 1498(a) for its third requested modification: permission "to sell Matrix X routers to third party resellers, where those products are to be resold to the federal government." Under that statute, a patent owner may not sue for infringement in federal district court when an infringing produced "is used or manufactured by or for the United States." Rather, the owner must seek compensation in federal claims court against the United States.

Defendant concedes that, ordinarily, it is unnecessary to include an exception for the federal government in an injunction because the Court of Appeals for the Federal Circuit has held that § 1498(a) trumps whatever the injunction says: "The

patentee takes his patent from the United States subject to the government's eminent domain rights to obtain what it needs from manufacturers and to use the same." W.L. Gore &Associates, Inc. v. Garlock, Inc., 842 F.2d 1275, 1283 (Fed Cir. 1988). Defendant argues that a modification is needed in this case because most of its sales "to" the government "frequently occur via a reseller and/or distributor to whom Enterasys first sells the product, and who then sells those products to the government." Dkt. #439, at 12.

Defendant's argument is not so much one about the proper scope of the injunction but rather the proper interpretation of § 1498(a). The question is whether a sale to a third party can qualify as one that is "for" the United States. If it does, then § 1498(a) applies and no modification to the injunction is needed. If it does not, then defendant would not be entitled to a modification of the injunction. In any event, defendant fails to develop an argument that § 1498(a) should be extended to cover third party sales. Accordingly, I will deny its request for this modification.

III. Motion to Stay the Injunction

Defendant seeks a stay of the injunction pending resolution of any appeal that it files. This requires a balancing of the harms that defendant will incur if the motion is denied and that plaintiff will incur if the motion is granted. Hilton v. Braunskill, 481 U.S. 770, 776 (1987). In support of its motion, defendant cites the affidavit of its director of product management, who avers that many employees are

devoted to the Matrix X router, including engineers, technicians, marketers and sales associates; these jobs will disappear if the injunction issues; and the absence of the Matrix X will make it harder to market its other products and maintain customer relationships. Ottoman Aff. n26-30, dkt. #442.

Plaintiff does not deny that defendant will suffer a great hardship without a stay and develops no argument regarding any harm it will suffer if a stay is granted. Instead, plaintiff argues in its motion to strike the Ottoman affidavit that defendant waived this issue by failing to submit Ottoman's affidavit in opposition to plaintiff's motion for a permanent injunction. That argument makes little sense. Although there is some overlap in the questions whether a plaintiff is entitled to a permanent injunction and whether the defendant should receive a stay of the injunction on appeal, the two questions obviously arise at different stages of the case and require different analyses.

For starters, the harm to the defendant is less important in the context of a motion for a permanent injunction. As stated in the case plaintiff cites: "One who elects to build a business on a product found to infringe cannot be heard to complain if an injunction against continuing infringement destroys the business so elected." Windsurfing International Inc. v. AMF, Inc., 782 F.2d 995, 1003 (Fed. Cir. 1986). However, the analysis changes in the context of a request for a stay on appeal because of the chance for reversal. The harms defendant describes are of the type that could leave a significant impact on its business even if it prevails on appeal.

Although I disagree with defendant's challenges to the jury's verdict, the court of appeals may see things differently. Accordingly, I will grant defendant's motion for a stay of the injunction pending appeal.

IV. Motion for Supplemental Damages and Interest

The parties agree that plaintiff is entitled to supplemental damages and interest and they agree on the rate of that interest, but they disagree about the amount of damages. Plaintiff says that it is entitled to an additional $82,981 in supplemental damages; defendant says that plaintiff is entitled to supplemental damages of $48,304. The parties agree on a prejudgment daily interest rate of .0134% and a postjudgment daily interest rate of .0039%. (Plaintiff says that "discovery of additional sales from Enterasys will reveal additional sales that may need to be included in an amended judgment," dkt. #460, at 2, but plaintiff has waived that issue by failing to file a separate motion to compel before filing its motion for supplemental damages.)

Defendant has explained each of its objections in its brief, but plaintiff's brief includes no argument in support of its figure on damages. Because plaintiff has the burden on this issue, I will accept defendant's number.

ORDER

IT IS ORDERED that

a. Defendant Enterasys Networks, Inc.'s motion for a new trial and request for a hearing, dkt. #451, is DENIED.

b. Defendant's motion to modify the permanent injunction, dkt. #438, is GRANTED IN PART. The injunction is AMENDED to allow defendant to use Mattix X routers and X-Pedition routers: (1) to perform diagnostic testing as part of providing customer service to its customers who identify problems with these products to defendant; and (2) in defendant's own internal network. Defendant's motion to modify the injunction is DENIED in all other respects.

c. Plaintiff's motion to modify the injunction, dkt. #446, is DENIED.

d. Under the amended injunction, defendant is ENJOINED as follows:

(i) Defendant, defendant's officers, agents, servants, employees, attorneys and other persons who are in active concert or participation with them who receive actual notice of this order are permanently enjoined from manufacturing, offering to sell, or selling in the United States, or importing into the United States, the X-Pedition 8000, the X-Pedition 8600, and the Matrix

X series products, either alone or in combination with any other product and any other existing or future product that is not more than a colorable variation of the X-Pedition 8000, the X-Pedition 8600 and the Matrix X series products;

(ii) Defendant, defendant's officers, agents, servants, employees, attorneys and other persons who are in active concert or participation with them who receive actual notice of this order are permanently enjoined from using in the United States, or importing into the United States, the X-Pedition 8000, the X-Pedition 8600, and the Matrix X series products, either alone or in combination with any other product and any other existing or future product that is not more than a colorable variation of the X-Pedition 8000, the X-Pedition 8600 and the Matrix X series products, except that defendant may continue (1) to perform diagnostic testing as part of providing customer service to its customers who identify problems with these products to defendant; and (2) use the infringing products in defendant's own internal network.

(iii) With the exception of those products used in conjunction with paragraph

5(b), defendant shall destroy its existing inventory of the X-Pedition 8000, the X-Pedition 8600 and the Matrix X series products within ten days of the final resolution of any appeal by defendant.

(iv) Also within 10 days of the resolution of appeal, defendant shall provide written notice of the order and injunction to its officers, agents, servants, employees, attorneys and other persons who are in active concert or participation with them.

e. Defendant's motion to stay the injunction pending appeal, dkt. #440, is GRANTED; plaintiff's motion to strike the declaration of defendant's expert, filed in support of defendant's motions to modify and stay the injunctions, dkt. #448, is DENIED. The injunction is STAYED pending resolution of defendant's appeal.

f. Plaintiff's motion for supplemental damages and interest is GRANTED IN PART. Plaintiff is awarded $48,304 in supplemental damages; $15,297 in prejudgment interest; and postjudgment interest at a rate of $10.38 a day.

g. The clerk of court is directed to enter an amended judgment accordingly.

Entered this 16th day of March, 2009.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

EXTREME NETWORKS, INC.,

Plaintiff,

AMENDED JUDGMENT IN A CIVIL CASE

v.

Case No. 07-cv-229-bbc

ENTERASYS NETWORKS, INC.,

Defendant.

This matter came before the court and a jury with District Judge Barbara B. Crabb presiding. The issues have been tried and the jury has rendered a verdict.

IT IS ORDERED AND ADJUDGED that judgment is entered:

1. Dismissing defendant Enterasys Networks, Inc.'s counterclaims for infringement of U.S. Patents Nos. 6,041,042, 5,195,181 and 5,430,727 with prejudice;

2. Dismissing plaintiff Extreme Networks, Inc.'s claims for invalidity of the '042, '181 and '727 patents without prejudice;

3. Limiting plaintiffs damages for infringement to those plaintiff incurred after it filed this lawsuit on April 20, 2007;

4. In favor of defendant on plaintiffs claims that the Matrix X, X-Pedition 8000 and X-Pedition 8600 routers infringe claim 1 of the '248 patent and claim 1 of the '438 patent;

5. In favor of plaintiff Extreme Networks, Inc. against defendant Enterasys Networks, Inc. in the amount of $201,213.00 on plaintiff's claims that defendant's Matrix X routers have infringed claims 21 and 29 of U.S. Patent No. 6,104,700, that the Matrix X, X-Pedition 8000 and X-Pedition 8600 routers have infringed claim 15 of U.S. Patent No. 6,678,248 and that the Matrix X, X-Pedition 8000 and X-Pedition 8600 routers have infringed claim 5 of U.S. Patent No. 6,859,438; and

6. In favor of plaintiff Extreme Networks, Inc. against defendant Enterasys Networks, Inc. in the amount of $48,304.00 in supplemental damages; $15,297.00 in prejudgment interest; and postjudgment interest at a rate of $10.38 a day.

IT IS FURTHER ORDERED AND ADJUDGED that defendant is permanently enjoined as follows:

A. Defendant, defendant's officers, agents, servants, employees, attorneys and other persons who are in active concert or participation with them who receive actual notice of this judgment are permanently enjoined from manufacturing, offering to sell, or selling in the United States, or importing into the United States, the X-Pedition 8000, the X-Pedition 8600 and the Matrix X series products, either alone or in combination with any other product and any other existing or future product that is not more than a colorable variation of the X-Pedition 8000, the X-Pedition 8600 and the Matrix X series products;

B. Defendant, defendant's officers, agents, servants, employees, attorneys and other persons who are in active concert or participation with them, who receive actual notice of this judgment are permanently enjoined from using in the United States, or importing into the United States, the X-Pedition 8000, the X-Pedition 8600, and the Matrix X series products, either alone or in combination with any other product and any other existing or future product that is not more than a colorable variation of the X-Pedition 8000, the X-Pedition 8600 and the Matrix X series products, except that defendant may continue (1) to perform diagnostic testing as part of providing customer service to its customers who identify problems with these products to defendant, and (2) use the infringing

products in defendant's own internal network.

C. With the exception of those products used in conjunction with paragraph (b), defendant shall destroy its existing inventory of the X-Pedition 8000, the X-Pedition 8600 and the Matrix X series products within 10 days of the final resolution of any appeal by defendant.

D. Also within 10 days of the resolution of any such appeal, defendant shall provide written notice of the order and injunction to its officers, agents, servants, employees, attorneys and other persons who are in active concert or participation with them.

E. The injunction shall run until the expiration of plaintiff's patents, which is February 3, 2018, with respect to the '700 and '438 patents, and March 16, 2020, with respect to the '248 patent.

Approved as to form this 18th day of March, 2009.

/s/
Barbara B. Crabb
District Judge

/s/
Peter Oppeneer
Clerk of Court

3/19/2009
Date

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2009-1325, -1346
EXTREME NETWORKS, INC.,
Plaintiff-Cross Appellant,

v.

ENTERASYS NETWORKS, INC.,
Defendant-Appellant.

Appeals from the United States District Court for the Western District of Wisconsin in case no. 07-CV-229, Chief Judge Barbara B. Crabb.

ORDER

NOTE: THIS ORDER IS NONPRECEDENTIAL.

A combined petition for panel rehearing and for rehearing en banc having been filed by the Cross-Appellant, and a response thereto having been invited by the court and filed by the Appellant, and the petition for rehearing and response, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

FOR THE COURT,

/s/
Jan Horbaly
Clerk

Dated: 12/20/2010

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2009-1325, -1346
EXTREME NETWORKS, INC.,
Plaintiff-Cross Appellant,

v.

ENTERASYS NETWORKS, INC.,
Defendant-Appellant.

Appeals from the United States District Court for the Western District of Wisconsin in case no. 07-CV-229, Chief Judge Barbara B. Crabb.

ORDER

NOTE: THIS ORDER IS NONPRECEDENTIAL.

Before Rader, Chief Judge, Lourie, Circuit Judge, and Prost, Circuit Judge.

A petition for rehearing having been filed by the Appellant, and a response thereto having been invited by the court and filed by the Cross-Appellant,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate of the court will issue on January 5, 2011.

FOR THE COURT,

/s/
Jan Horbaly
Clerk

Dated: 12/29/2010

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No. 10-1199

Supreme Court, U.S.
FILED
MAY 2 - 2011
OFFICE OF THE CLERK

In The

Supreme Court of the United States

EXTREME NETWORKS, INC.,

Petitioner,

v.

ENTERASYS NETWORKS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Where the district court rejected Extreme's request for a final judgment and instead expressly retained jurisdiction in the 5 November 2008 judgment to calculate and award pretrial compensatory damages and prejudgment interest—mandatory patent infringement damages under 35 U.S.C. § 284—did the Federal Circuit correctly hold that it had jurisdiction over this appeal when Enterasys then timely filed its notice of appeal within 30 days after entry of the 19 March 2009 Final Judgment, which for the first time fixed the full amount of statutory patent damages, and also modified the scope of the permanent injunction?

RULE 29.6 STATEMENT

Gores ENT Holdings, Inc., a privately-owned corporation, is a parent of Respondent Enterasys Networks, Inc. Gores ENT Holdings, Inc. is a wholly-owned subsidiary of Enterprise Networks Holdings, Inc., which is in turn a wholly-owned subsidiary of Enterprise Networks Holdings B.V. Through Enterprise Networks Holdings, Inc., Seimens A.G. and Enterasys are under common ownership and control.

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STATEMENT

Petitioner Extreme Networks, Inc. in seeking a writ of certiorari inappropriately narrows the question presented to "[w]hether an unqualified money judgment for a sum certain" was final. Unfortunately for Extreme, the underlying premise of its question as phrased is indisputably false, even by its own admission. Note 1 of Extreme's petition recognizes that the jury only awarded Extreme damages for a limited portion of the infringement found. The district court entered an initial judgment with the explicit expectation of calculating the remaining royalty damages, as required by 35 U.S.C. § 284, and fixing the amount of prejudgment interest sought. Under longstanding Federal Circuit jurisprudence applying statutes exclusive to patent law, only the 19 March 2009 Final Judgment from which Enterasys timely appealed satisfied the patent damages and federal appellate jurisdiction prerequisites to start the 30-day period to file a notice of appeal.

REASONS FOR DENYING THE PETITION

No broader circuit split, "widespread confusion shared across the courts of appeals," or "disarray" is implicated by this decision of the Federal Circuit. That court properly applied its own well-established case law, which in turn relies on the unique patent damages statute, 35 U.S.C. § 284, informed by its separate interlocutory appellate jurisdiction statute

pertaining to finality, 28 U.S.C. § 1292(c)(2). Notably, Extreme omits both of these statutes from its petition, and glosses over the nonprecedential nature of the decision it challenges here. Under, *e.g.*, *PODS Inc. v. Porta Stor, Inc.*, 484 F.3d 1359 (Fed. Cir. 2007), the Federal Circuit correctly took jurisdiction over Enterasys's appeal. In contrast, in light of the foregoing, and when the additional procedural details that Extreme ignores in its petition are considered, *Osterneck v. Ernst & Whinney*, 469 U.S. 169 (1989), and its progeny relied on by Extreme are readily distinguishable and not at issue here.

I. Extreme Mischaracterizes Aspects of the Record that Were Not Fully Discussed in the Nonprecedential Decision Below.

Extreme exploits the abbreviated format of the nonprecedential decision of the Federal Circuit, which emphasized the lack of prejudgment interest in the district court's initial judgment. In the process, Extreme fails to acknowledge until page 12 of its petition that the decision below was in fact nonprecedential, excising that significant procedural reality from the citation format in its Opinions Below section, as well as removing the "nonprecedential" legend required by the issuing court's rules from the copy of the opinion itself reprinted in the appendix at Pet. App. 1a.

A. Nonprecedential Decisions Should Not Be Treated as Adding Significantly to the Body of Law They Apply.

The Federal Circuit takes the distinction between its precedential and nonprecedential decisions seriously, and has adopted its own specific rules on this:

> **Rule 32.1 Citing Judicial Dispositions**
>
> **(a) Disposition of Appeal, Motion, or Petition.**
>
> Disposition of an appeal may be announced in an opinion; disposition of a motion or petition may be announced in an order. An appeal may also be disposed of in a judgment of affirmance without opinion pursuant to Federal Circuit Rule 36. A nonprecedential disposition shall bear a legend designating it as nonprecedential. A precedential disposition shall bear no legend.
>
> **(b) Nonprecedential Opinion or Order.**
>
> An opinion or order which is designated as nonprecedential is one determined by the panel issuing it as not adding significantly to the body of law.

The Federal Circuit further instructs in the Practice Notes to its Rule 35 that, "A petition for rehearing en banc is rarely appropriate if the appeal was the subject of a nonprecedential opinion by the panel of judges that heard it." Enterasys submits

that a petition for a writ of certiorari is even less appropriate.

B. More than Merely Prejudgment Interest Remained Unresolved to Render the 5 November 2008 Judgment Not Final.

Extreme's attempt to use this unpublished decision of the Federal Circuit as a vehicle to interest this Court in a purported circuit split on a broader appellate jurisdiction issue illustrates the danger in blurring the lines between precedential and non-precedential decisions. Numerous details of the proceedings below were not discussed in full in the Federal Circuit's short opinion, which Enterasys will endeavor to fill in as contemplated by this Court's Rule 15.2. Most importantly, the pending issues that precluded finality at the time of the district court's initial 5 November 2008 judgment were not limited to a determination of prejudgment interest, as Extreme would have the Court misguidedly believe, but included a calculation of pretrial damages and the scope of the permanent injunction.

Strangely, Extreme repeatedly admits that it had demanded both "supplemental damages" and prejudgment interest, while overlooking the significance of this in its argument. Note 1 of the petition explains that the 30 May 2008 jury verdict only awarded compensatory damages through 8 January 2008, and that Extreme was due additional compensation from that date forward to make it whole. The district court

was well-aware of this, it was not a "mistake" that needed to be addressed with postjudgment motions.

In a motion filed 5 June 2008, well before the initial judgment, Extreme emphasized the need for additional financial information from Enterasys to calculate the remaining damages owed. A19072.[1] Attached to Extreme's filing was a Proposed Order for Final Judgment and Permanent Injunction that (1) stated the jury verdict amount of $201,213; (2) provided blank lines for the court to fill in for damages from 9 January 2008 forward; (3) similarly provided blank lines for prejudgment interest; and, (4) asked the court to include language that, "This is a Final Judgment and is Appealable." A19080-84.

Enterasys responded by providing a letter and CD with the first portion of the requested financial information 6 days later, on 11 June 2008, A22585-86; followed by the remainder sent on 22 August 2008, A22587-88. In other words, the request for the still-unquantified damages and the prejudgment interest was made approximately 5 months prior to entry of the initial 5 November 2008 judgment. Likewise, Extreme held in its hands the necessary financial information months before entry of the initial judgment to quantify pending damages.

---

[1] For these undisputed additional record details, Enterasys provides the Federal Circuit Joint Appendix cites.

Rather than fill in the blanks and enter a complete final judgment that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment," *Crown Packaging Tech., Inc. v. Rexam Beverage Can Co.*, 559 F.3d 1308, 1311 (Fed. Cir. 2009), the district court entered a preliminary judgment that left out both the additional damages and the prejudgment interest. Significantly, the court rejected Extreme's request for "Final Judgment" language, and instead ordered the opposite—"This court retains jurisdiction to enforce any and all aspects of this order and to award plaintiff supplemental damages and costs." Pet. App. 32a.[2]

Having failed to obtain the Final Judgment it requested, Extreme waited 55 days to file its Motion for Supplemental Damages and Interest on 30 December 2008. While Extreme now admits it "did not invoke any rule in filing this motion," Pet. at 10, it had tried to revise history before the Federal Circuit and falsely claimed this was a Rule 60(b)(2) motion based on "newly discovered evidence."[3]

---

[2] Extreme's suggestion on page 29 and note 10 of its petition that the district court necessarily and implicitly denied its requests for prejudgment interest and mandatory damages under § 284 is simply nonsensical. The court specifically retained jurisdiction to decide these critical issues that were actively pending, and as expected it did rule on them in due course.

[3] On page 3 of Extreme Networks' Reply in Support of Its Cross-Appeal, Extreme wrote "While not expressly citing the rule, Extreme Networks' motion was pursuant to FED. R. CIV. P. 60(b)(2), which, by its own terms, 'does not affect the finality of a

(Continued on following page)

In reality, Extreme had sat for months on the financial information sent by Enterasys. Almost certainly, Extreme took its time precisely because it recognized that the district court "retain[ed] jurisdiction" and no such Rule 60(b) motion was required on damages.

Extreme also declines to discuss the changes the 19 March 2009 Final Judgment made to the scope of the permanent injunction against Enterasys. Both parties filed motions following the initial 5 November 2008 judgment to modify the scope of the injunction. The court denied Extreme's motion, but granted Enterasys's in two respects. The district court rewrote the injunction to allow Enterasys to (1) service existing customers; and, (2) use its own products internally. Pet. App. 42a-43a, 46a-49a (16 March 2009 Order); 52a-54a (19 March 2009 Final Judgment).

"[W]hen the lower court changes matters of substance . . . in a judgment previously rendered . . . the period within which an appeal must be taken . . . begin[s] to run anew." *Conway v. United States*, 326 F.3d 1268, 1276 (Fed. Cir. 2003) (quoting *Fed. Trade Comm'n v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211-12 (1952)). Accordingly, these significant changes to the 5 November 2008 judgment required a written entry of judgment under FED. R. CIV. P. 58 and FED. R. APP. P. 4(a)(7). *See Bailey v. Potter*, 478 F.3d 409, 411 (D.C. Cir. 2007) (separate

---

judgment or suspend its operation.'" Extreme has dropped that characterization before this Court.

document requirement is "interpreted to prevent loss of the right to appeal, not facilitate loss"). This in turn triggered a 30-day period from the 19 March 2009 Final Judgment to file a notice of appeal, independent of the incomplete damages calculation and missing prejudgment interest in the first judgment. Where substantive issues remain unresolved, a "judgment standing alone as issued by the district court [is] insufficient to establish dismissal of the entire action." *See SafeTCare Mfg., Inc. v. Tele-Made, Inc.*, 497 F.3d 1262, 1267 (Fed. Cir. 2007).

As set forth in greater detail in Part III, *infra*, this fuller picture of the record instantly distinguishes Extreme's primary authority, *Osterneck v. Ernst & Whinney*, as well as the other decisions Extreme relies on that dealt strictly with concerns about appellate jurisdiction when prejudgment interest—alone—remained unresolved. Presumably that explains why the Federal Circuit declined to discuss *Osterneck* at all, though counsel for Extreme devoted much of her oral argument to it. *Osterneck* is inapposite for other reasons as well.

II. Patent Statutes and Federal Circuit Precedent Extreme Omits Establishes that Jurisdiction Was Proper.

Compounding its disregard of key procedural realities, Extreme additionally neglects to inform the Court about precedential case law from the Federal

Circuit directly on point, along with the unique patent damages statute, 35 U.S.C. § 284, and appellate jurisdiction statute, 28 U.S.C. § 1292(c)(2), that further render this case distinct from, *e.g.*, *Osterneck*.

A. Congress Enacted a Distinct Statutory Scheme for Patent Cases.

Section 284 governs damages in a patent case:

> **35 U.S.C. § 284 Damages**
>
> Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court.
>
> When the damages are not found by a jury, the court shall assess them. In either event the court may increase the damages up to three times the amount found or assessed. Increased damages under this paragraph shall not apply to provisional rights under section 154(d) of this title.
>
> The court may receive expert testimony as an aid to the determination of damages or of what royalty would be reasonable under the circumstances.

Given that the district court "shall" compensate Extreme fully "for the use made of the invention by

[Enterasys]," no "unqualified money judgment for a sum certain" could have existed, contrary to the recurring misstatements in Extreme's petition, until entry of the 19 March 2009 Final Judgment. Extreme concedes that the jury's award of $201,213 did not cover the full period of infringement. Pet. at 9 n.1, 11. Plus, the district court had indicated that it would fix interest, including the prejudgment interest, which under section 284 then becomes an essential element of the final judgment in a patent case.

Similarly absent from Extreme's petition, beyond 28 U.S.C. § 1291 and § 1295, Congress separately provided an avenue in § 1292(c)(2) for "interlocutory" appeals to the Federal Circuit in exactly this sort of situation that arises regularly in patent cases:

> **28 U.S.C. § 1292. Interlocutory Decisions**
>
> **(c)** The U.S. Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—
>
> > **(2)** of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the U.S. Court of Appeals for the Federal Circuit and is final except for an accounting.

The Federal Circuit confirmed that "'[a]ccounting,' as used in the statute, refers to infringement damages pursuant to 35 U.S.C. § 284." *Special Devices, Inc. v. OEA, Inc.*, 269 F.3d 1340, 1343 n.2 (Fed. Cir. 2001). The creation of interlocutory jurisdiction where a

patent infringement judgment is "final except for an accounting" of course proves that such a result otherwise is not an appealable final judgment. Congress thereby recognized what Extreme refuses to. Applying this logic, the 5 November 2008 judgment, lacking a full accounting of damages, could not be final.

B. The Federal Circuit Has Consistently Held an Unquantified Monetary Award in a Patent Case Is Not Final.

A longstanding and consistent body of Federal Circuit precedent addressing its unique jurisdiction over patent appeals, none of which Extreme cites, demonstrates that jurisdiction was proper here.

First and foremost, the Federal Circuit dealt with the same issue, albeit arising from a slightly different procedural posture, in *PODS, Inc. v. Porta Stor, Inc.*, 484 F.3d 1359 (Fed. Cir. 2007). The *PODS* district court entered a first judgment where the accompanying order stated the court's intent to entertain a motion for additional damages. *See id.* at 1365. Like here, a subsequent motion was filed and granted, and the district court enhanced the preliminary damages award. *See id.* at 1365 & n.4. In *PODS*, however, unlike Enterasys, the appellant went ahead and filed a notice of appeal based on the initial judgment. *See id.* The Federal Circuit held that the notice of appeal was premature, because the first judgment was not final, though it ultimately took jurisdiction over the

appeal. *See id.* By this reasoning, the district court's 5 November 2008 judgment was also not final, and Enterasys correctly relied on the 19 March 2009 Final Judgment.

The Federal Circuit applied this reasoning in two other analogous situations to conclude that judgments in patent cases with unquantified monetary components, as here, were not final for jurisdictional purposes. In *Special Devices*, at issue was the finality of a judgment that awarded but did not quantify attorney fees under 35 U.S.C. § 285. *See* 269 F.3d at 1343. Observing that section 285, like section 284, is unique to patent law, the court applied its own precedent. *See id.* The Federal Circuit then "conclude[d] that a decision to award unquantified attorney fees in an exceptional case under 35 U.S.C. § 285 is not final." *Id.* at 1345.

The *Special Devices* opinion relied heavily on the Federal Circuit's earlier decision in *View Engineering*, which reached the same result in the context of an award of unquantified Rule 11 sanctions. *See id.* at 1343; *View Eng'g, Inc. v. Robotic Vision Sys., Inc.*, 115 F.3d 962 (Fed. Cir. 1997). There, given that FED. R. CIV. P. 11 is not unique to patent law, the court collected decisions from six other circuits, each of which held that such a sanction order "is not final for purposes of appeal until the district court has decided the amount of liability." *View Eng'g*, 115 F.3d at 964. The Federal Circuit then decided that a "decision imposing Rule 11 sanctions is not final, and hence not

appealable, until the amount of the sanction has been decided by the district court." *Id.*

PODS, *Special Devices*, and *View Engineering* all instruct that an incomplete—*i.e.*, unquantified—award of compensatory damages in a patent case under section 284 cannot be final. Therefore, Enterasys properly waited for entry of the second judgment on 19 March 2009 to measure its time to file a notice of appeal. Extreme's petition does not challenge this body of Federal Circuit case law in any way, rather Extreme avoids it entirely and would divert the Court's attention to less-applicable decisions from other circuits.

III. *Osterneck* and Its Progeny Address a Factually and Legally Different Scenario.

In terms of authority, Extreme anchors its petition on the notion that "no material difference" exists between this case and *Osterneck*. Pet. at 14. As explained above, nothing could be further from the truth, after a more-complete presentation of the events in the district court and the relevant statutes.

Not only is Extreme's factual predicate for the attempted comparison to *Osterneck* wrong, but Extreme misses the point of that opinion itself. *Osterneck* only analyzed the narrow question of "whether a motion for discretionary prejudgment interest filed after the entry of judgment constitutes a Rule 59 motion to alter or amend the judgment and renders ineffective any notice of appeal filed before a ruling on that

motion."[4] *Osterneck*, 489 U.S. at 170. The district court had invited, and plaintiffs filed, a motion for prejudgment interest within 10 days of the judgment.[5] *See id.* at 172. After the court granted the motion, plaintiffs filed a new notice, but left off Ernst & Whinney as a party. *See id.* The court of appeals held, and this Court affirmed, that the earlier notice of appeal was ineffective to preserve the appeal as to Ernst & Whinney. *See id.* at 173.

To begin with, *Osterneck* dealt with a motion exclusively for prejudgment interest. Here a portion of the reasonably royalty damages mandated by section 284 indisputably remained pending. Meanwhile, Extreme's motion for both categories of additional damages was admittedly not captioned under any rule, and was filed 55 days after the initial 5 November 2008 judgment. Because FED. R. CIV. P. 59(e) allows only 28 days to file a motion, however Extreme may wish to recaption its motion *ex post facto*, it could never be held to have been a FED. R. CIV. P. 59(e) motion. *Osterneck* simply cannot be contorted to fit the scenario before the Court.

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[4] FED. R. APP. P. 4(a)(4) was amended in 1993 to allow that a premature notice of appeal in a scenario like this would become effective on disposition of the motion, not merely void.

[5] The 10-day time limits in FED. R. CIV. P. 59(e) and FED. R. APP. P. 4(a)(4)(A)(vi) were changed to 28 days in 2009.

IV. Alternatively, Enterasys Secured Its Appellate Rights through Its Stay Motion Filed within 30 Days of the Initial Judgment.

Finally, for the sake of completeness in complying with the Court's Rule 15.2, Enterasys argued below and maintains here that, even if the 5 November 2008 judgment is treated as final, Enterasys nevertheless timely filed a FED. R. APP. P. 3 notice of appeal by filing a motion to stay the injunction pending appeal. When filed within the 30-day time period allowed under FED. R. APP. P. 4(a)(1)(A), a motion to stay serves as notice of appeal under FED. R. APP. P. 3 if it meets three requirements: "[i]t must (A) specify the party or parties taking the appeal . . . ; (B) designate the judgment, order, or part thereof being appealed; and (C) name the court to which the appeal is taken." *Int'l Rectifier Corp. v. IXYS Corp.*, 515 F.3d 1353, 1357 (Fed. Cir. 2008) (quotation omitted). Enterasys's motion to stay the injunction easily satisfied these requirements, and is functionally identical with the motion that succeeded in *IXYS*.

Furthermore, Enterasys's motion to stay both identified the 5 November 2008 judgment and the district court's (future) order addressing Enterasys's forthcoming new-trial motion. That the court had not yet ruled on Enterasys's expected new-trial motion is immaterial, because FED. R. APP. P. 4(a)(4)(B)(ii) states that a notice of appeal filed after judgment (here, the 5 November 2008 judgment) but before a ruling on a new trial motion becomes effective when the order disposing of the last such remaining motion

is entered. Accordingly, Enterasys's motion to stay alternatively secured its appellate rights.

CONCLUSION

Extreme's petition for a writ of certiorari fails to establish any compelling basis for further review of the Federal Circuit result. To the contrary, Extreme merely takes advantage of the abbreviated nonprecedential format of the decision below to paint a woefully inadequate and unfair caricature of what transpired in the district court. Upon consideration of the fuller picture of the proceedings in light of the relevant patent specific statutes and Federal Circuit precedent, Extreme's petition should be denied.

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No. 10-1199

In the Supreme Court of the United States

EXTREME NETWORKS, INC.,
Petitioner,

v.

ENTERASYS NETWORKS, INC.
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Respondent has failed to contest the certworthiness of this case. The petition presents two important questions of federal practice on which the courts of appeals are divided.

As to three of petitioner's four reasons for granting the petition, the brief in opposition is simply silent. Respondent does not contest that the courts of appeals are sharply divided over the meaning of this Court's decision in *Osterneck v. Ernst & Whinney*, 489 U.S. 169 (1989), and whether a money judgment for a sum certain is final in the absence of any award of prejudgment interest. Nor does respondent dispute the existence of a circuit split regarding whether the time to appeal runs from the date of an order granting a postjudgment tolling motion or from the date of any subsequent amended judgment. Finally, respondent does not dispute that both questions presented involve important and recurring questions of federal practice that implicate day-to-day litigation in federal courts throughout the nation.

Rather than dispute any of these reasons for granting the petition, respondent mainly responds with merits arguments disputing petitioner's fourth and final reason for granting the petition—that the Federal Circuit's decision was erroneous. Respondent argues that the district court's November Judgment was nonfinal under the Federal Circuit's own caselaw and because of the district court's retention of jurisdiction. Respondent argues alternatively that, if the November Judgment was

final, then the time for respondent to file its notice of appeal nevertheless ran from the date of the district court's entry of the Amended Judgment. As respondent has not identified any defects in this case as a vehicle to reach the questions presented, this Court should grant the petition.

1. Respondent first argues that because the Federal Circuit's decision was "nonprecedential," it was not worthy of en banc review by the Federal Circuit. Br. Opp'n at 2–4. The nonprecedential nature of the decision below, however, does not render this case a defective vehicle to resolve the two undisputed circuit splits implicated by the questions presented. Rather, this Court regularly reviews unreported or nonprecedential decisions as vehicles to resolve important questions of federal law. *See, e.g.*, *KSR Int'l Co. v. Teleflex, Inc.*, 550 U.S. 398 (2007) (reviewing and reversing the Federal Circuit's nonprecedential decision in *Teleflex, Inc. v. KSR Int'l Co.*, 119 F. App'x 282 (Fed. Cir. 2005)). Indeed, as discussed below, respondent confirms that the Federal Circuit's decision below is fully consistent with precedential decisions of that court.

2. Respondent asserts that "the pending issues that precluded finality" at the time of the district court's November Judgment "were not limited to prejudgment interest, as Extreme would have this Court misguidedly believe, but included a calculation of pretrial [supplemental] damages and the scope of the permanent injunction." Br. Opp'n at 4. However, the former issue (damages) is a merits issue, while the latter issue (the scope of the

injunction) is irrelevant to either certworthiness or the merits.

a. As to damages, respondent argued below that the November Judgment was not final because the damage award did not include supplemental damages or prejudgment interest sought by petitioner. *See* Pet. at 12. Although the Federal Circuit did not address respondent's contention concerning supplemental damages, that contention is subsumed within the first question presented.

For purposes of finality, there is no difference between prejudgment interest and supplemental damages, as both are "element[s] of [plaintiff's] complete compensation." *See Osterneck*, 489 U.S. at 175. As explained in the petition, resolution of the first question presented will also dispose of respondent's argument, advanced below and now here, that the November Judgment was not final because it did not include all damages sought by petitioner. *See* Pet. at 21 & n.4, 29 & n.10. Petitioner contends that the November Judgment, as an unqualified money judgment for a sum certain, was final because it necessarily denied petitioner's claim for *both* supplemental damages and prejudgment interest. *See id.* Thus, respondent's argument that the absence of an award of supplemental damages in the November Judgment precluded finality is nothing more than a merits argument subsumed by the first question presented.

b. As to the injunction's scope, respondent never contended below that the November Judgment was nonfinal because the scope of the injunction was

somehow unsettled when the district court entered that judgment. Nor, in truth, does respondent actually make such an argument here. Rather, when respondent explains its injunction-related argument, respondent simply notes that both parties filed *post*-judgment motions within ten days of the November Judgment. *See* Br. Opp'n at 7; *see also* Pet. at 10 (describing petitioner's Federal Rule of Civil Procedure 59(e) motion to modify the injunction and respondent's Federal Rule of Civil Procedure 60(b) motion to modify the injunction). But there was no "pending" issue as to the scope of the injunction when the district court entered the November Judgment—the parties merely raised this issue *after* the November Judgment was entered. Although both motions tolled the time to appeal *if* the November Judgment was otherwise final, *see* Fed. R. App. P. 4(a)(4)(A)(iv) and (vi), neither motion is relevant to the first question presented: whether the unqualified November Judgment for a sum certain was final *when entered*. Therefore, respondent's vague reference to the "scope of the injunction" as somehow affecting the finality of the November Judgment is a feint, irrelevant to either certworthiness or the merits.

3. Respondent argues that the Federal Circuit's holding that an unqualified money judgment is nonfinal if it does not include prejudgment interest is consistent with that circuit's caselaw holding that a money judgment is nonfinal if it does not award all damages the patentholder is entitled to under the patent damages statute, 35 U.S.C. § 284. *See* Br. Opp'n at 8–13. Respondent is correct. This only buttresses the case for granting the petition, because

it confirms the Federal Circuit's position on one side of the circuit split implicating the first question presented.

The statutory requirement for finality in the Federal Circuit is identical to the statutory requirement for finality in the regional circuits. *Compare* 28 U.S.C. § 1295(a)(1) (conferring appellate jurisdiction in the Federal Circuit in appeals from "final decision[s]" in patent cases) *with* 28 U.S.C. § 1291 (conferring appellate jurisdiction upon the regional circuits from "final decisions"). Nothing in Section 284 creates a different test for finality in patent infringement cases[1]; if an otherwise final judgment for a sum certain does not award all of the damages that a patent holder is entitled to under Section 284, all that means is that the judgment is *erroneous*, not nonfinal, and that the plaintiff's

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[1] Although finality in the Federal Circuit and the regional circuits is identical, the Federal Circuit does possess unique *interlocutory* jurisdiction not shared by the regional courts of appeals. *See* 28 U.S.C. § 1292(c)(2) (providing for exclusive jurisdiction in the Federal Circuit of appeals from a judgment in a civil action for patent infringement that is "final except for an accounting," i.e., final except for an award of damages). Section 1292(c)(2) does not create a different test for finality in patent infringement cases; it simply provides for interlocutory appeals in such cases that are final "*except* for an accounting." 28 U.S.C. § 1292(c)(2) (emphasis added). Although respondent repeatedly cites to Section 1292(c)(2), *see* Br. Opp'n at 2, 9, 10, respondent did not argue below, and does not argue here, that the Federal Circuit's appellate jurisdiction in this case could be sustained under that statute.

recourse is either to seek to amend the judgment under Civil Rule 59(e) or to appeal. *Cf. Herzog Contracting Corp. v. McGowen Corp.*, 976 F.2d 1062, 1064 (7th Cir. 1992) (the omission of prejudgment interest from an otherwise final judgment "*would not have detracted from the finality of the original judgment; it just would have made it erroneous*") (emphasis added) (Posner, J.).

Thus, the Federal Circuit's test for finality conflicts with the alternative test employed by most circuits. The Federal Circuit holds that a money judgment's failure to award prejudgment interest or other damages to which the plaintiff is entitled by statute renders the judgment nonfinal. Br. in Opp. at 11–13; Pet. App. at 6a–8a. But several other circuits hold that the failure to award prejudgment interest—and by logical extension, any other element of compensatory relief to which the plaintiff may be entitled—does not affect finality. Instead, in those circuits, relief must be sought by either a timely Civil Rule 59(e) motion to amend the judgment, or by appeal. Pet. at 18–20 (collecting cases). And decisions such as *Dunn* clarify that such decisions are final even if the unawarded damages were requested prior to the judgment's entry, because the entry of an unqualified judgment necessarily denies all outstanding requests for relief. *See Dunn v. Truck World, Inc.*, 929 F.2d 311, 313 (7th Cir. 1991). This Court should grant certiorari to resolve this circuit conflict, in which the Federal Circuit has taken one side.

4. Respondent argues that this case is different from *Osterneck* because the November Judgment

lacked supplemental damages as well as prejudgment interest, whereas in *Osterneck* the original judgment only lacked prejudgment interest. *See* Br. Opp'n at 14. As noted above, this distinction is not material, as prejudgment interest and damages are both elements of compensation. For present purposes, the significance of *Osterneck* is that this Court assumed that a money judgment for a sum certain was final and that the only way to modify that judgment was through a timely-filed Civil Rule 59(e) motion to alter or amend the judgment. *See Osterneck*, 489 U.S. at 177 (stating that "the decision whether a particular pending motion falls under Rule 59(e) will of necessity determine whether an *otherwise final* judgment is appealable") (emphasis added); *see also id.* at 175 (noting that, in *White v. New Hampshire Dep't of Employment Security*, 455 U.S. 445 (1982), the Court stated that the determination of whether a given motion was a Civil Rule 59(e) motion "'all but' answered the finality question").

Respondent also argues that this case is distinguishable from *Osterneck* because petitioner's motion for prejudgment interest admittedly could not have been a Civil Rule 59(e) motion as it was filed beyond that rule's applicable time limit.[2] *See* Br. Opp'n at 15. Once again, this distinction is not

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[2] In the Federal Circuit below, petitioner characterized its motion for prejudgment interest as a Civil Rule 60(b)(2) motion for relief from judgment based upon newly discovered evidence. Respondent disputed that characterization. Resolution of that dispute is not necessary to resolve the two questions presented.

material, as the significance of *Osterneck* is that this Court treated a money judgment for a sum certain as final for purposes of categorizing the motion for prejudgment interest in that case.

5. Respondent also argues that the November Judgment could not be final because the district court retained jurisdiction to decide supplemental damages and prejudgment interest. Br. in Opp. at 6. Respondent's argument that the retention of jurisdiction defeated finality is at most a merits argument, which does not render this case a defective vehicle for reaching the first question presented. And on the merits of the first question presented, respondent's argument is wrong for two separate and independent reasons.

First, respondent omits that the district court's retention of jurisdiction *predated* the entry of the November Judgment. *See* Pet. App. 32a (retaining jurisdiction in Opinion and Order dated October 28th, 2008 "to award plaintiff supplemental damages, interest, or costs"). The November Judgment, on the other hand, was both for a sum certain and unqualified. Pet. App. 33a–35a (November Judgment). As a result, the November Judgment must be treated as having denied petitioner's outstanding requests for supplemental damages and prejudgment interest. *See Dunn*, 929 F.2d at 313 (entry of judgment denies all pending requests for relief, because "[a]ny other approach produces a morass"). Because nothing in the November Judgment itself—an unqualified money judgment for a sum certain—suggests that the district court reserved the issues of supplemental

damages and prejudgment interest for later resolution, the November Judgment must be taken at face value.

Second, to the extent that the district court's November Judgment can be read to incorporate the earlier retention of jurisdiction, a retention of jurisdiction is not a reservation of issues for future decision that destroys finality. The former is just an axiomatic truism: a district court retains jurisdiction for specified time periods under Civil Rules 59(e) or 60(b) to resolve issues that may arise after the entry of a final judgment, whether a court says so expressly or not, without any effect upon the judgment's finality. Thus, in *Osterneck*, the district court's instruction to the plaintiff to file a Rule 59(e) motion to seek prejudgment interest did not destroy finality. *See* 489 U.S. at 171. To negate the finality of an otherwise final judgment that adjudicates all claims and grants, as here and as in *Osterneck*, unqualified relief, a district court must reserve an issue for future resolution—not just restate its authority to resolve future disputes.

6. As to the second question presented, respondent likewise simply makes a merits argument. Respondent argues that, even if the November Judgment were final, the district court's modification of the injunction in the Amended Judgment restarted the time to appeal from the date of the entry of the Amended Judgment. Br. Opp'n at 7.

As noted in the petition, a circuit split exists regarding whether the time to appeal runs from the

date of an order granting a postjudgment tolling motion or from the date of any subsequent amended judgment. *See* Pet. 22–26. Respondent does not deny either the existence of this split or that, absent an alternative ground to sustain the judgment below, its appeal would be untimely if this Court holds both that the November Judgment is final and that the time to appeal runs from the date of an order granting a postjudgment tolling motion, as petitioner contends. This Court should therefore grant certiorari to resolve this split.

7. Finally, respondent proffers an alternative merits argument to sustain the Federal Circuit's judgment. Respondent argues that its motion to stay the district court's injunction pending appeal—filed two days after entry of the November Judgment—can and should be treated as a surrogate notice of appeal under the authority of *Int'l Rectifier Corp. v. IXYS Corp.*, 515 F.3d 1353, 1357 (Fed. Cir. 2008) (treating motion to stay injunction pending appeal as notice of appeal).[3]

Respondent's alternative ground to sustain the judgment below provides no reason for this Court to deny the petition on the two certworthy questions presented. Instead, this Court should grant the petition and order merits briefing and argument. Respondent can assert its alternative ground to sustain the decision below. If this Court rules in favor of petitioner on the questions presented, this Court can then consider whether to entertain

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[3] Respondent raised this argument below, but the Federal Circuit did not address it.

respondent's alternative ground or to remand to the Federal Circuit to allow that court to consider it in the first instance. But, in either event, this Court or the Federal Circuit would easily dispose of respondent's argument.

In *Smith v. Barry*, 502 U.S. 244 (1992), this Court held that a document filed by a *pro se* party within the relevant time limitations to appeal may be treated as the "functional equivalent" of a notice of appeal under Federal Rule of Appellate Procedure 3 if the document "provide[s] sufficient notice to other parties and the courts" of the putative appellant's "intent to seek appellate review." *Id.* at 248. Although this Court adopted the rule within the context of affording a lenient construction to a *pro se* party's filings, some circuits have—rightly or wrongly—applied the same standard to represented parties such as respondent. *See Int'l Rectifier*, 515 F.3d at 1357; *but see United States v. Cohn*, 166 F. App'x 4, 9–10 (4th Cir. 2005) (noting that majority of cases following *Smith v. Barry* involve *pro se* parties; holding represented party to higher standard).

Thus, even assuming the *Smith v. Barry* rule could be applied to this case, respondent still cannot establish that its motion for stay of the injunction satisfied the requirements of Appellate Rule 3. In order to serve as the functional equivalent of a notice of appeal, a filing "must specifically indicate the litigant's intent to seek appellate review . . . to ensure that the filing provides sufficient notice to other parties and the courts." *Barry*, 502 U.S. at 248; *see also Cohn*, 166 F. App'x at 10–11 (court of appeals refusing to construe motion that only

indicated party's desire to file appeal in the future as functional equivalent to notice of appeal).

Here, respondent's motion for a stay of the injunction opened by stating that "an appeal *will be filed following the resolution of all post-trial motions*," and later stated that respondent intended to file a motion for a new trial. Fed. Cir. A19915–A19916 (emphasis added). In fact, respondent filed its motion for a new trial on November 20, 2008 (Dkt. No. 389). Once the district court disposed of all post-trial motions, respondent filed, albeit untimely, its notice of appeal. As a result, respondent's language and actions notified petitioner and the district court that respondent neither intended to divest, nor believed that it had divested, the district court of jurisdiction over the case by filing its motion for stay of injunction.

Thus, respondent's motion for stay was not the functional equivalent of a notice of appeal. It did not indicate that the final November Judgment was, in the words of Appellate Rule 3(c)(1)(B), *"being appealed."* For example, if the district court had granted respondent's yet-to-be filed motion for a new trial, respondent would not have pursued an appeal at that time, if ever. Given these signals, the motion did not provide notice to petitioner or the district court that respondent was appealing the November Judgment. *See Harris v. Ballard*, 158 F.3d 1164, 1166 (11th Cir. 1998) (refusing to treat motion to extend time to appeal as notice of appeal because it provided insufficient notice of intent to appeal and "compels the conclusion that the notice of appeal is something yet to be filed"); *Longstreth v. City of*

Tulsa, 948 F.2d 1193, 1994 (10th Cir. 1991) (same); *Thomas v. Morton Int'l, Inc.*, 916 F.2d 39, 40 (1st Cir. 1990) ("To treat such a request for extra time as the notice itself would be to render the notice requirement meaningless."); *United States v. Little*, 392 F.3d 671, 681 (4th Cir. 2004).

Indeed, respondent recognized the difference between its motion for stay and a notice of appeal when, out of time, it later filed a notice of appeal. *See Thomas*, 916 F.2d at 40 (declining to find extension request was functional equivalent of notice of appeal where counsel subsequently filed an untimely notice of appeal). As a result, respondent's own conduct undermines any argument that the motion for stay can or should be construed as a surrogate notice of appeal. Rather, respondent's motion to stay cannot save the Federal Circuit's jurisdiction over respondent's untimely appeal.

CONCLUSION

For the reasons provided above and in the petition for a writ of certiorari, this Court should grant the petition.

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